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American Communism and Cold War Censorship: The Creation of a New American Citizen

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American Communism and Cold War Censorship: The Creation of a New American Citizen

Abstract

In this paper, I will examine the relationship between political censorship and Democratic Identity in the United States. Specifically, I will focus on anti-Communist measures aimed at members of the Communist Party of the United States during the Red Scare in the 1950's. This work will help illuminate on the relationship between political censorship and democratic identity, both on the part of the censors and the censored. Furthermore, by analyzing the Supreme Court's response to these measures, this work will help demonstrate the link between the Court's modern jurisprudence on political speech and the decisions of this era.

Keywords

American Communism, First Amendment, Marketplace of Ideas, Social Sciences, Political Science, Green, Jeffrey, Jeffrey Green

Disciplines

Constitutional Law

American Communism and Cold War Censorship

The Creation of a New American Citizen

By

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A Thesis submitted in partial fulfillment
of the requirement for the Degree of Arts in Political
Science with Distinction

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Introduction

Theory

One of the most notable developments in American Constitutional Jurisprudence in the past century is the growth of in the scope and breadth of Free Speech theory and doctrine. One of the key frameworks within this debate has been the “Mof Ideas”, first introduced by Justice Oliver Wendall Holmes in his dissent in *Ambras v. United States*. This perspective views free speech as a necessary tool in the creation of an effective public debate that is necessary for the pursuit of “the truth”. By operationalizing speech, however, this perspective ignores the democratizing aspects of free speech that make it “the indispensable condition of nearly every other form of freedom,”¹ as it is only through free expression that individuals are able to exert any control and agency over the political decisions that affect their lives. Furthermore, by creating “truth” as the meaning of free speech, the Marketplace framework opens up the possibility of political censorship in the name of maintaining the integrity of the Marketplace itself. This establishes the idea that certain ideologies, and the people that hold them, are “outside” the realm of acceptable Democratic politics. While they still have access to institutional means of influence like voting, their ideologies are so dangerous or otherwise counter-productive that permitting them a place in the marketplace would threaten the state that undergirds that marketplace. In this way, the censored individuals will be

¹ Gillman, Howard, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Rights Jurisprudence*, 645

forced to pick from choices completely separate from their own political desires. In short, they are obedient to the desires of the uncensored majority.²

With this in mind, I hypothesize that by removing specific ideological groups from the democratic process, restrictions on speech isolates and radicalizes these targeted groups. Conversely, by promoting the removal of these groups from the Democratic process, I hypothesize that censoring political speech causes those who promote speech censorship to develop a stratified view of Democracy wherein certain individuals are permitted to influence public discourse and others, due to the content of their ideas, are not which ultimately undermines the equal access Democratic governance is founded on. I will explore these hypotheses by analyzing the development of the Communist Party of the USA (CPUSA) and those who advocated censoring it throughout the 1940's and 50's. This is a valuable source of information in American free speech history because the anti-communist measures of the 1950's ultimately led to a marked change in First Amendment Jurisprudence in the U.S. After the Supreme Court deemed the anti-communist Smith Acts unconstitutional in *Yates v. United States*, the Court developed a new approach to Free Speech protection that took into consideration both the needs of the Marketplace of Ideas and the relationship between free speech and conceptions of democratic self-government. This new jurisprudence was based on maximizing state tolerance for unpopular speech by censoring only direct calls for illegal activity. In order to justify this expanded tolerance the Court emphasized the importance of an notion of citizenship wherein each individual is guaranteed the

² Post, Robert, *Democracy and Equality*, 27

space necessary to create his or her own ideologies. Rather than justifying the Marketplace of Ideas as a way of finding a single truth, this new model protects the Marketplace as a way of allowing individuals to develop their own notions of truth that will then compete for acceptance by their peers. By rejecting the idea of ideological parameters for the Marketplace, this model expands the definition of a legitimate citizen by affirming access to the Democratic process for all individuals regardless of beliefs.

Marketplace of Ideas v. Democratic Self Governance

The “Marketplace of Ideas”, first developed by the 19th century philosopher John Stuart Mills³, boils down to the belief that by adding more and more perspectives to the ongoing debate that drives Governmental Policy, the best ideas would gain ever-increasing support while ideas that did not hold up to logical, or political, competition would fall to the wayside. While this is a clear oversimplification, ignoring many of the cognitive benefits that J.S. Mills believes come with free and open debate, it establishes the fact that one of the main tenants of this framework is the utility of Speech. The question isn’t necessarily what free speech can do for the individual: it is what free speech can do for the state. This doesn’t mean the individual is not considered in the Marketplace of Ideas: J.S. Mills believed “the human faculties of perception, judgment, discriminative feeling, and even moral preference, are exercised only in making a choice”⁴. This development of individual

³ Mills, J.S., *On Liberty*

⁴ Ibid, 23

agency was more a fringe benefit, however, compared to the political truths that the state could only realize through an open and engaging public discourse.

Although this philosophy has received broad support in modern legal history, one of the main debates in American Free Speech Jurisprudence is how exactly to create an effective marketplace. Some scholars argue that the Marketplace of Ideas, just like an economic marketplace, must be regulated in a way that promotes the best possible discourse⁵. In this type of system, “what is essential is not that everyone shall speak, but that everything worth saying shall be said”⁶. The Marketplace, therefore, is only useful when it is effectively harnessed in a way that helps develop what is considered by the government to be a “correct” ideology. Thusly, government acts as a moderator that, through selective regulation, allows what the censors believe to be the most reasonable arguments to be presented while screening out speech that is considered biased or having a negative impact on the intellectual efficacy of the discussion⁷. Certain ideas or means of expression are censored not out of a fear over that speech’s ability to incite violence and lawless action, but out of a fear over how that speech could damage the intellectual and political integrity of the discourse.

This push for active government regulation designed to create a just and effective marketplace has played a part in many aspects of modern First Amendment Jurisprudence. One clear example of this is the Miller Test created in Justice Burger’s decision in *Miller v. California* in order to determine what material

⁵ Sunstein, Cass, *Democracy and the Problem of Free Speech*, 28-43

⁶ Post, Robert, *Individual Autonomy and the Reform of Public Discourse*

⁷ Stone, 2967

can be considered “obscene”. While the test has three parts, the most relevant to the concept of a regulated Marketplace of Ideas is the final prong, which states that, when judging something to be obscene, it must be considered “whether the work, as a whole, lacks serious literary, artistic, political, or scientific value”⁸. While the other two parts of the test are focused on determining whether or not something can be construed as “sexually offensive”, this final prong is meant to make sure that any works that are sexually offensive but may benefit the intellectual and artistic development of the United States are allowed to enter the Marketplace of Ideas. In this way, the government is in theory preventing material that may offend the community from being publicly presented while still allowing the free exchange of relevant and engaging ideas.

Another prominent example of the Court’s desire to regulate the Marketplace of Ideas is the long history of Campaign Finance regulation. As the Court explained in *Buckley v. Valeo*, in a time where money is an essential component of successful political campaigns and “large contributions are given to secure political quid pro quos from current and potential office holders, the integrity of our system of representative democracy is undermined”.⁹ In doing so, the Marketplace of Ideas is distorted to better reflect the desires and ideologies of those who can make such large contributions. This is a particularly illustrative example because it actively seeks to remove certain individuals, or at least limit the speech of certain individuals, from the political process due to perceived fears of the consequences that speech may yield. In this case, the fear is that money gives disproportionate

⁸ *Miller v. California*, Chopper, 357-361

⁹ Chopper, 571

influence to those who have access to expanded resources, thereby undermining the equal access inherent in Democratic governments.

Although these examples demonstrate the widespread acceptance of the need to regulate the Marketplace of Ideas, the Supreme Court has been much more hesitant to regulate political ideologies in the name of creating a more functional public discourse. As one critic explained, “the individuals who have been the major beneficiaries of Free Speech jurisprudence...are not social valued dissidents but those whose values are deemed annoying at best and dangerous at worst”¹⁰ From the Ku Klux Klan¹¹ to Vietnam War Protestors¹², the Supreme Court has expanded the rights of expression for ideological minorities. In particular, the protection of hate speech has come under harsh criticism from many legal critiques who argue that such speech causes irreparable harm to the Marketplace of Ideas by promoting intolerance in the speakers and a sense of inferiority in the victims of such speech.¹³ This hesitance towards regulating such political ideologies is not born out of a refusal to embrace the Marketplace of Ideas when it comes to political ideologies: many of the decisions that established these protections for ideological minorities were based on the Court’s desire to create as open and free-flowing a Marketplace as possible. Rather, this refusal to embrace political censorship in the name of marketplace maintenance is born out of the Court’s recognition of the importance of

¹⁰ Schauer, Frederick, *Codifying the First Amendment*

¹¹ Chopper, 316

¹² *Tinker v. Des Moines*, O’Brien, 664

¹³ Delgado, Richard, *Are Hate Speech Rules Constitutional Heresy? A Reply to Steven Gey*

another school of thought in First Amendment Jurisprudence: the Democratic Self-Governance model of speech.¹⁴

According to this model, the value of speech isn't necessarily that it allows for the best and most productive ideas to rise to the top. Rather, the benefit of Free Speech is the connection it establishes between the will of the individual and the actions of the state. This interpretation is founded on an understanding that "collective decision making is merely oppressive unless there is some internal connection between the particular will of individual citizens and the general will of the collectivity"¹⁵ If an individual is unable to inject their own opinions into the larger political discourse, they will be unable to contribute to the ongoing public discourse that drives decision making in Democratic governments. In this way, censoring individuals right to speech impairs the ability of individual citizens to develop a sense of control over the political process. Without this sense of agency, the censored individual is no longer an active, contributing citizen in a democracy: they are politically silent subjects to the wills of the uncensored majorities.

This emphasis on democratic self-governance versus a regulated Marketplace of Ideas can be seen in a number of Supreme Court cases. In *Miami Herald Publishing Co. v. Tornillo*, decided in 1987, the Court deemed a Florida law requiring news outlets to permit candidates the right to reply against any criticisms. As the Court explained, the law produces a chilling effect on speech by incentivizing editors to avoid controversies, thereby inadvertently censoring the speech of individuals based on their political ideas. Even in the previously discussed case of

¹⁴ Post, *Individual Autonomy and Self Governance*, 16

¹⁵ Post, *Democracy and Equality*, 27

limitations on financial contributions to political campaigns, the Court has been clear that this does not mean that limitations can be placed on the independent expenditures of campaigns or how much a candidate him or herself donates to their campaign. While accepting a need to limit campaign contributions in order to prevent disproportionate influence in the political process, they simultaneously ruled “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.” As this shows, while the court is willing to regulate speech at times, it has made a point of rejecting laws designed to regulate the marketplace that may result in the censorship of certain political ideologies.

This conflict demonstrates one of the main conflicts between the Democratic Self-Governance school of thought and the Marketplace of Ideas school of thought, namely the fact that the Marketplace theory, by emphasizing the political utility of speech, opens up the door to the censorship of ideas that are considered “unacceptable” because of the negative impact they have on the efficacy of the overall political discourse. This can clearly be seen in the theories on obscenity and hate speech discussed earlier. In both of these situations, proponents of censorship have determined that these ideas cause such a decided degradation in the quality and direction of political conversations that allowing them complete expression would corrupt and undermine the nation’s public discourse. While the Marketplace, as Justice Holmes articulated in *Abrams*, is predicated on the protection of politically and socially unpopular ideas, the fact that its ultimate goal is the determination of “truth” suggests that definite political truths do indeed exist. If this premise is

accepted, it is the responsibility of the State to prevent certain dangerous ideas from corrupting the integrity of the political system.

This concept of inalienable moral codes has serious implications for the Democratic Identity of both the individuals being censored and those that are advocating censorship. For the censored groups, they are made to feel as if they are completely outside the realm of Democratic politics. In doing so, censorship fosters a sense of institutional hopelessness that is a driving force behind the development of non-democratic means of instituting change. For those that advocate censorship, the creation of moral codes, and the subsequent rejection of groups whose ideologies fall outside these codes, creates a stratified perspective towards democracy where certain individuals are allowed access to governmental policy and others are not. This undermines the notion of equal institutional access to the government that is one of the underlying components of Democracy¹⁶. In this way, political censorship alters the Democratic nature of an entire state by creating a culture of stratified democratic access.

This view of distinct ethical norms is in stark contrast to Democratic Self-Governance School, which “denies that there can be any possible neutral position within public discourse, because public discourse is precisely the site of political contention about the nature of collective identity”¹⁷. In this view, it is impossible to ever ascertain “the truth” because “the truth is not a constant: it is a socially defined perspective based on unique political and social ideologies.” This relativist perspective towards truth has been codified into American Free Speech

¹⁶ Post, *Democracy and Equality*

¹⁷ Post, *Reconciling Theory and Doctrine*, 2369

Jurisprudence through the institutionalization of “content-neutrality”¹⁸ when analyzing the scope of Speech protection. According to this principle, the Court cannot consider the moral or political implications of ideologies when determining whether or not they deserve protection under the First Amendment: all they must determine is whether it is some form of political speech. While this does not protect speech in the form of illegal actions, such as the burning of draft cards¹⁹, or speech that incites “imminent lawless action”²⁰, it has pushed the court to protect even the most socially repugnant speech in order to prevent the formation of a tyranny of the majority.

Anti-Communism and a New Jurisprudence

This neutrality, however, is a relatively recent development. Up until the late 1950’s, the newly accepted Marketplace of Ideas jurisprudence, while promoting certain protections, often led to the suppression of political speech that was viewed to be promoting the overthrow of the United States Government²¹. One of the most notable examples of ideologically motivated censorship in this era is the state censorship of the CPUSA from the mid to late 40’s to the late 50’s. Although this censorship took a variety of forms, it always had the same underlying justification: the need to protect the United States from the spread of an ideology that many perceived to be predicated on the violent overthrow of non-communist governments. The individuals behind these restrictions didn’t view Communism as a

¹⁸ Stone, Geoffrey, *Content-Neutral Restrictions*

¹⁹ *Tinker v Des Moines Independent Community School District*, O’Brien, 664

²⁰ *Brandenburg v. Ohio*, Chopper, 316

²¹ Stone, Geoffrey, *Free Speech in the Age of McCarthy: A Cautionary Tale*, 1393-1396

political platform: they viewed as an existential threat to the very existence of the United States. In light of this, they moved to prevent these “dangerous” ideologies from being spread, often with the Supreme Court’s consent. In the wake of this massive censorship, the concept of what American democracy meant came into question. Would America tolerate opinions that many considered a legitimate threat to their way of life or would they create strict ideological boundaries within the state? In the end, the Supreme Court, decided that groups could not be persecuted for simply discussing the idea of revolution: they had to actively engage in the steps of planning and enacting a violent revolution²². In doing so, the Court created a new perspective on the government’s relationship to ideological dissent wherein citizens ideologies, no matter how abstractly hostile and unpopular, had to be tolerated. They were citizens, and unless they actively were working towards committing illegal activities, they could advocate anything they wanted. In the wake of the paranoid, witch-hunt environment of the Red Scare, this distinction was the necessary divider that created the basis for the content-neutral jurisprudence of contemporary First Amendment Jurisprudence²³.

While the impact of the *Yates* decision has been recognized as an important part of free speech jurisprudential development in the latter part of the 20th century,²⁴ it has often been presented as more of an indicator of the possibility for future change rather than an actual agent in creating that change. Instead, many scholars have seen to the Warren Court’s work in the 1960’s, such as their decisions

²² Chopper, 316

²³ Stone, Geoffrey, *Free Speech in the Age of McCarthy*

²⁴ Murphy, Paul, *The Shaping of the First Amendment*, 112

in *Tinker v. Des Moines* and *Brandenburg v. Ohio*, as the critical decisions that have gone on to define modern Free Speech doctrine.²⁵ While I agree that these decisions did create many of the structures of contemporary Free Speech doctrine, such as the “Imminent Lawless Action” test derived from *Brandenburg*, I think these developments are in fact expansions and, in a way, realizations of the decisions made by the Supreme Court in *Yates v. United States*. By imbuing the Marketplace of Ideas framework with an emphasis on expanded notions of what constitutes citizens, this decision harkened a new merger of the Marketplace of Ideas and Democratic Self-Governance schools of thought.

In order to better understand the influences behind this monumental change in Free Speech in the U.S., I will analyze the changes in the Democratic Identity of the CPUSA and those who directly called for their censorship. In order to do this, I will look at the rhetorical and strategic changes of the CPUSA and the Anti-Communist movement in response to these shifting identities. Furthermore, I will demonstrate the way in which these developments ultimately led to a change in the Court’s jurisprudence that rejected the existence of ideological boundaries within the Marketplace of Ideas. In doing so, I hope to not only reveal the political history that continues to define the way American jurists see Free Speech protection, but also to better understand the dynamic between Democratic Identity and Speech Regulation.

²⁵ Ibid, 127

History of Political Speech Jurisprudence

Like all “inalienable rights”, the First Amendment is not a static, unchanging entity: it is a socially constructed idea that exists within a given political context. That does not mean, however, that each generation creates an entirely new approach towards Freedom of Speech. Changes are built upon previous changes, and therefore in order to truly understand the importance and impact of the Supreme Court’s decisions in *Yates*, it is essential to understand the historical trajectory that led to that moment. Only then can we understand what the Justices were trying to accomplish, as it was this history they were working from.

Localism and Majority Rule

Like much of American Constitutional Law, the origin of Free Speech jurisprudence, more specifically political speech jurisprudence, lies with English Common Law, as codified by the Judge William Blackstone in the middle of the 18th century. Although these laws made provisions to guarantee free speech, what exactly constituted free speech was radically different than how it seen today. The crux of this difference is the Common Law’s emphasis on prohibiting prior restraint, whereby the Government prevents an individual from voicing a particular opinion. Long a favored method of the English Crown in stemming oppositional opinions,²⁶ the practice fell sharply out of favor following the English Revolution of the 1680’s and quickly came to be seen as the major obstacle towards free speech. This new hostility towards prior restraint, however, did not mean that individuals were free

²⁶ Murphy, 15

from government punishment for voicing unpopular opinions. While prohibitions on prior restraint prevented the government from preventing unpopular opinions from being stated, it was entirely within its power to punish individuals after the fact for stating those unpopular opinions. In essence, individuals were free to express themselves, as long as they accepted the price that speech may come with.²⁷ To many of the framers of the Constitution, prior restraint was the only real opposition to free political speech.

To contemporary Americans, this seems like tenuous logic: by allowing the government to punish opinions they deemed unpopular, the law served as a deterrent for Free Expression in much the same way that prior restraint did. This reading, however, ignores the fundamentally different relationship between the citizen and the state that existed in pre-industrial America. In this era, many held the greatest threat to individual freedoms to be a highly centralized state that represented the interests of the distant few, a fear firmly established by the rule of the British Empire.²⁸ One solution to this crisis was the strengthening of local governments and state governments. These institutions, due to their physical proximity and smaller populations, would be more responsive to the needs of their constituents. ²⁹ This emphasis on localism is why the Bill of Rights was originally designed only to restrict the actions of the Federal Government. In such an environment, “circumstances seemed to dictate that through politics and political participation, collectivities of voters, state and local, would determine the

²⁷ Ibid, 16

²⁸ Anti-Federalist Papers

²⁹ Brutus no. 1, *Anti-Federalist Papers*

appropriate policies in those areas”³⁰. In this system, the right to Free Speech was not a universal protection of unpopular expression, but a continuum whose boundaries could be decided by the interests and morals of the particular population where that speech arose.

This democratic approach towards speech regulation demonstrates the relationship between a sense on “belonging” to a specific ideological or political entity and free speech. The basis of this difference is the fact that this approach was designed to protect the majority from the will of a powerful minority. Rather than a mechanism of protecting the “other”, this approach was designed to protect the majority from that “other”. Indeed, in the early days of the United States, “newly freed American communities had little time for dissenters who did not subscribe to all the norms that the community leaders set down. Direct democracy tended to reflect respect for freedom of “right” ideas”.³¹ In this way, Free Speech was designed as a way of allowing the community to define its priorities and guiding principles without interference from minority powers in government. Minority ideas, on the other hand, were forced to either succeed in the Democratic process or be silenced.

While an emphasis on localism rather than centralization was a key aspect of the Antebellum approach towards individual rights, it was not the only part. Just as important was limiting the scope of the Federal Government’s authority. This proposed solution originated during the debates over whether or not to include a Bill of Rights in the Constitution. The question was whether “one [should] limit the powers of government to a set of acceptable responsibilities, or one [should] grant

³⁰ Murphy, 45

³¹ Ibid, 12

the government general powers and then reduce those powers through an articulation of specific exceptions”³². Although the Bill of Rights was eventually ratified, it was almost universally accepted amongst the framers of the Constitution that the key to protecting the rights of citizens lied in the limitations placed on Congressional powers in articles 1 and 8 of the Constitution ³³. In this framework the limits on government power would be the main bulwark against tyranny, with the Bill of Rights serving as a last line of defense.

This emphasis on limited government, in light of the American’s aforementioned focus on localism, did not extend to the states. This did not mean, however, that the State governments could do as they please. The main restriction on these legislative bodies was the firmly held belief that there were certain natural limitations on what an assembly could and could not do, such as a violation of firmly established legal rights (i.e. property rights). At the core of these restrictions was a belief that state action, above all else, had to serve public, not private, interests. This is in keeping with the limited scope of government because rather than actively protecting certain individual rights, “the people granted to their legislators, not the general authority to act as they wished, but the more specific authority to act *in the public interest*, and any law that represented mere ‘class legislation’ or an ‘arbitrary interference’ with liberty or property went beyond a legislatures constitutionally delegated authority”.³⁴ This emphasis on the purpose and public effects of legislation rather than the impact it had on individual’s is in line with the broader

³² Gillman, pg. 626

³³ Ibid, 627

³⁴ Gillman, 630

philosophy of limited government because it combatted the main concern of antebellum America: the formation of a government advancing the interests of one faction over all others.³⁵ If you were within the ideological majority, than your speech was protected. If you were not, however, than you were at the whims of the Democratic system.

This emphasis on limited government rather than the development of a system of protected rights kept the Supreme Court from developing a comprehensive doctrine towards Free Speech for much of American history. This is not meant to suggest that there was no recognition of individual rights, but rather that the legislature, not the courts should define the legal boundaries of these rights. The first notable example of this is the Sedition Act of 1798. Fueled by a combination of the growing antipathy between the Federalist Adams administration and the Jeffersonian Anti-Federalists, the act prohibited any person to voice any opinions on the government and its representatives “with intent to defame....or to bring them, or either of them, into contempt or disrepute; or to excite against them, the hatred of the good people of the United States”³⁶. This law, which rested on the legal concept of seditious libel, was used to target a number of the newspapers employed by the anti-Federalists to support their various political enterprises. They justified these actions by claiming that those censored were part of a small, subversives minority seeking to undermine the Federalist majority.³⁷ Anti-Federalists, on the other hand, saw an attempt by a minority power in government

³⁵ Madison, James, *The Federalist Papers*, Federalists # 10

³⁶ Smith, James Morton, *Freedom's Fetters*, 435

³⁷ Ibid, 441

to silence the powerless masses. This backlash eventually helped Thomas Jefferson win the Presidential election of 1800, and he quickly revoked the laws and pardoned all those prosecuted under it. The fact that the debate between Federalists and Anti-Federalists concerned who justifiably represented the majority, rather than the justness of censoring ideological minorities, demonstrates the way in which early American Free Speech philosophy was based on protecting the majority, not the minority.

While controversies over free speech continued to arise on the local and state level throughout the early part of the 18th century, it was the national debate over slavery that created the next great national crisis concerning the censorship of speech. As the Abolitionist movement gained strength, the number of anti-slavery publications increased dramatically. The threat this posed to the slave system was not lost on Southern Democrats. In order to stymie this danger, a number of Southern States imposed a series of postal regulations that prohibited any prohibitionist's literature from entering their state.³⁸ Even in territories where no formal laws were created prohibiting anti-slavery publications, pro-slavery communities often took it upon themselves to keep such incendiary talk to a minimum. Such was the case for Elijah Lovejoy, an abolitionist pamphleteer who was lynched in 1837 in Alton, Illinois while protecting his printing press.³⁹ While these laws and acts of mob violence served to embolden abolitionists, it was not until the legal censorship reached the Federal Government that it became an issue of national importance.

³⁸ Murphy, 49

³⁹ Dillon, Merton, *Elijah Lovejoy: Abolitionist Editor*

The national debate over state censorship of abolitionist ideas was ignited by Congress' enactment of the Gag Rule preventing the presentation of any abolitionist petitions in 1836. Justified as a response to the disruptive nature of the seemingly endless supply of petitions, the law was seen by Abolitionists as an attempt to prevent them from having any influence on legislation.⁴⁰ Ironically enough, it was John Quincy Adams, former president, current Massachusetts's representative, and son of the architect of the Sedition Act, who immediately turned the Gag Rule debate into a question of civil liberties.⁴¹ In doing so, Adams and his supporters transformed the Gag Rule from a minor blow to the Abolitionist movement to a major victory, as now Abolitionists were able to connect advocacy of slavery with a rejection of civil liberties ⁴². As one Virginian noticed, "the argument over petitions made more abolitionists in one year, by identifying the right to petition with the question of slavery, than the abolitionists would have made for themselves in twenty-five years". Eventually, in the wake of this national controversy, the Gag Rule was repealed in 1844.

While this era of politically, rather than constitutionally, protected rights to Free Expression was often marked by localized, majoritarian suppression of unpopular opinions⁴³, such as local ordinances against blasphemy and the aforementioned state laws preventing the proliferation of anti-slavery literature, these episodes demonstrate that the American people did, to a degree, believe in a form of free speech. The central tenant of this view was that censorship had to be

⁴⁰ Murphy, 50

⁴¹ Seward, W.H., *The Life and Public Service of John Quincy Adams*, 289

⁴² Murphy, 51

⁴³ Ibid, 55

based on a desire to advance the common good rather than trying to bolster the power of particular sectors of society.⁴⁴ The Alien And Sedition Act, by punishing Anti-Federalists and other groups antagonistic to the Federalist Party solely for their disagreement with the Adams administration, the law represents a clear attempt to silence one political group for the benefit of another. This framework can again be seen in the controversy over the Gag rule, as critics of the law held that it was designed not to stream line legislative action but remove a certain ideological faction, the abolitionists, from the political realm because of the threat it posed to another faction, the slave owners. In this framework, democratic means control of speech rights is based on the assumption that the state will have the interests of society as a whole in mind when deciding which opinions to censor and which to permit.

By embracing censorship when enacted for “the greater good”, this framework created the necessary space for one of the major phenomena in traditional American Free Speech jurisprudence: state censorship of opinions that were deemed by the majority of voting citizens as “un-American”. At the heart of this emphasis on Americanism was a brand of xenophobia that equated foreignness with the type of dual loyalty that undermines the citizenship of modern states.⁴⁵ A major justification for the Alien and Sedition Act was the Federalist Party’s attempt to quash the Anti-Federalists support for the French Revolution.⁴⁶ To do so, they

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⁴⁵ This is an idea more extensively discussed by Thomas Hobbes in *The Leviathan* in explaining the need for maintain only one sovereign

⁴⁶ Martin, James P., *When Repression is Democratic and Constitutional: The Federalist Theory of Representation and the Sedition Act of 1798*, 140

connected these views to the whims of dangerous French radicals that sought to undermine the new nation's independence from the affairs of Europe. This pattern was again at work in the creation of the Gag rule, as Southern supporters believed that abolitionists were going against one of the main economic and social underpinnings of their culture and indeed of American prosperity. In both of these cases, by placing the targeted individuals in opposition to the general American community, they justified their censorship as a way of advancing the greater good. Although this was not the only justification for speech censorship, most notably the central place of prohibitions on seditious libel, it was of central importance in determining whether or not certain ideologies, rather than individual forms of speech, could be tolerated.

The logic behind this interpretation of Free Speech is that un-American forms of dissent don't simply arise from differently minded citizens, but traitorous foreigners "duping their innocent followers and demanding that their loyalty be transferred from obedience to central American values to the service of anti-American philosophies"⁴⁷. This xenophobic perspective forms the crucial link between democratic identity and political speech in the U.S. An ideology being different or even repugnant to certain parties, or even the majority of citizens, alone does not create a standard for censorship. When this repugnance, however, is framed as inherently un-American it becomes an active threat to the stability of American political culture, and in the eyes of many, the American state itself. In doing so, censorship does not violate the civil rights of those that are censored

⁴⁷ Murphy, 60

because these individuals have been branded as enemies of the state, thereby forfeiting the protections afforded to citizens. This emphasis on fealty to an idealized concept of “Americanism” demonstrates one of the crucial components of this system: a belief in an unchanging and inalienable definition of what it means to be an American.

The “Other” and War

This ideological “othering” of political dissent, as can be expected, is most pronounced in times of war. One of the most notable examples of this is President Lincoln’s abolishment of habeas corpus for accused Confederate sympathizers during the Civil War. While habeas corpus is not directly related to free speech, Lincoln’s suspension of this right was often targeted at individuals who voiced support for the Confederacy, thereby removing them from the nation’s political dialogue. While the Constitution states in Section 1, Article 9 that the Habeas Corpus may only be suspended by Congress “when in cases of rebellion and invasion the public safety may require it”, the Lincoln Administration, working in an environment where there was a very real fear that the Union would soon find “every department of the government paralyzed by fear”⁴⁸, felt that the only possible way to prevent this disloyalty from undermining the Union war effort was to vigorously nip it in the bud without the encumbrances of trials, or even legislative consent. While Lincoln privately fretted over the legal implications of his actions, publicly he presented the restrictions as an ugly wartime necessity.⁴⁹ In these terms, the

⁴⁸ Murphy, 62

⁴⁹ Ewers, Justin, *Revoking Civil Liberties: Lincoln’s Constitutional Dilemma*, 1

suspension of Free Speech is a form of self-defense for a state teetering on the brink of the abyss.

This idea of censorship as a logical, ethical extension of a state's right to protect its existence is the cornerstone of the "Nativist" approach towards Free Expression. In order to understand this, it is important to first understand the fact that ideological repression is relatively logical. If the main concern of those in power is to stay in power, one way to guarantee this outcome is to prevent the formation of any oppositional forces that may rise against you⁵⁰. In pre-modern Western states, where the authority of the ruler is paramount rather than the needs of its subjects, this was the accepted norm. In the modern era, however, such blind pursuit of power goes against the principle of popular rule. This violation, however, can be justified if the censorship is not based on the ruling elite's desire to stay in power, but instead their desire to protect the integrity of the State. Again, this line of reasoning is logical, but this time it comes with the added force of political legitimacy. This legitimacy is based on the Social Contract theory that the rights of modern citizens, while providing a number of social and cultural benefits, are grounded in the State's ability to maintain order and the prevention of arbitrary violence against its citizens.⁵¹ Without this non-violent order, the various rights of citizens are sacrificed to one simple truth: might makes right. Even if a small percentage of individuals decided to embrace this philosophy, without a State to deter them, they would overwhelm their pacified neighbors. In order to prevent

⁵⁰ Martin, Redish, *The Logic of Persecution*, 8

⁵¹ This concept of State sanctioned force as the underpinnings of the Social Contract is extensively discussed in Thomas Hobbes' *The Leviathan*

this, the state establishes a monopoly on violence designed to promote the interests of the people, and if domestic forces threaten this monopoly, it is the government's responsibility to re-establish control. Although this is only one of a number of different competing Social Contract theories, most notably Locke's more individualistically minded framework,⁵² Hobbes influence on the place of security in defining the confines of a modern state have played a large role in the development of American Democracy.⁵³

With this understanding of censorship as a form of state-based self-defense, the use of foreignness as a justification for political censorship makes logical sense. If a person or people have a specific view of what America is, whether it's a nation built on Judeo-Christian values or one based on secular Enlightenment thinking, then anybody who professes ideas explicitly counter those ideas could be viewed as a threat to the continued existence of those principles. This logical conclusion develops an increased urgency when these differences are viewed not as a contrast in interpretations of the American nation, but instead as an attempt to impose on America certain "un-American" ideals. Only by preventing these individuals from professing these ideas can the State protect itself from being infected by foreign-born concepts that refute the core of Americanism. With this logic in mind, labeling certain ideologies, and those who advocate for them as "foreign" becomes a powerful political tool. By grounding censorship in an attempt to fight back foreign subversion, the actions of the censors are transformed from a vindictive attempt to silence a minority to a valiant crusade to save America.

⁵² Locke, John, *Two Treatises on Government*

⁵³ Steinberger, Peter, *Hobbes, Rousseau, and the Modern Conceptions of the State*

Although not directly related to Free Speech, James Madison's critique of factions effectively illustrates the way in which the notion of foreignness can lead to the removal of certain groups from the political body.⁵⁴ As he explains, political factions do not view opposing groups as political hurdles that can be defeated within the larger Democratic system, but as enemies against what they have defined as the ultimate political truth who must be removed from the larger political body before it corrupts it from the inside. The irreconcilable nature of these differences are the greatest threat to any Republican government because they divide a nation among itself as citizens come to view each other not as parts of the same political family, but as diametrically opposed forces that happen to inhabit the same country. This directly relates to the use of "othering" in Free Speech jurisprudence because it demonstrates how political ideologies can change from reasonable opinions into absolute facts by their advocates. This ultimately leads them to view their opponents' opinions as invalid hurdles on the road to absolute truth. From this perspective, removing them from the political system is not only strategically advisable, but also politically essential for the continued survival of the state. By placing control over political censorship in the hands of majoritarian mechanisms, combined with the rationale that any restrictions of speech based on the common good is justified, censorship will be developed on the basis of the accepted norms of whichever faction is currently in power.

Despite this long-standing condemnation of factions as anti-American, a condemnation explicitly articulated by President George Washington in his Farewell

⁵⁴ Madison 10, The Federalist Papers

Address that has shaped American political thought to this day, the continued existence of repressive government policies up to and during the Civil War demonstrate a continued emphasis on ideological unity and national security rather than pluralism. There were, however, signs of changing opinions. Most notable of these shifts is the Supreme Court's 1866 decision in *ex parte Milligan* to deem President Lincoln's suspension of Habeas Corpus and enactment of Martial Law due to threatened invasion as unconstitutional. As the Court explained, "The necessity must be actual and present, the invasion real, such as effectually closes the courts and disposes the civil administration"⁵⁵. Although this decision was related to suspension of the democratic and legal norms of the U.S. as a whole, the precedent it establishes is clear: the rights of citizens cannot be revoked due solely to perceived national security threats. Only by demonstrating the imminence, rather than the abstract possibility, of such an attack can individual rights be denied. While this ruling clearly echoes Justice Brandeis sentiments in his "clear and present danger" test some 60 years later, only after the Industrial Revolution and the numerous social and political changes it brought about would this connection between denying certain individual rights and the imminence of security threats be cemented into policy.

The Industrial Revolution

While the Industrial Revolution transformed America into one of the major economic powers in the world, it also created a degree of economic and social stratification that many at the time believed threatened American liberty and

⁵⁵ Murphy, 63

equality. America's transformation from a rural, agrarian society to an industrialized member of the international economy "triggered unprecedented demands for legislation that would mitigate some of the social costs of industrialization and, in particular, would extend special protection to those classes that felt victimized by coercive market mechanisms"⁵⁶ The problem facing these newly inspired activists was that the existing system of Individual rights was grounded in the protection of the property rights that provided the legal underpinnings for the economic inequalities of the time. In order to rectify this, a new generation of legal jurists began to question the efficacy of the traditional, limited government-residual freedoms approach to Constitutional jurisprudence.⁵⁷ Instead, these individuals called for the expansion of State authority to permit it to regulate economic affairs, as seen by the ratification of the Interstate Commerce Act in 1897, while simultaneously creating a comprehensive set of individual freedoms that the now-empowered Federal government could not violate. This radically altered the relationship between the State and the individual by giving the Government a new degree of influence on day-to-day life while also establishing certain rights that could not be violated unless absolutely necessary. From a jurisprudential perspective, the burden shifted from requiring the state to prove a law served the public good to requiring the state to prove a law did not violate the enumerated rights of the affected individuals.

Controversies over the implications this proposed shift in the nation's jurisprudential framework had for the regulation of speech were particularly

⁵⁶ Ibid 67

⁵⁷ Gillman, 645

pronounced. This is in large part due to the fact that the proponents of the legislative goals this new approach was created to justify often came under harsh government censorship. In particular, the labor movement of the late nineteenth century, and the various political ideologies it was attached to, was continually harassed by government officials that viewed them as dangerous threats to America's economic and political well being. The reason that this movement faced continual state censorship is because they challenged the prevailing connections between economic freedom and individual freedom that undergirded the laissez faire policies of the Industrial Revolution⁵⁸. This approach, which expanded upon the U.S.'s long-standing emphasis on the protection of individual property rights, argued that the right to free expression rested on "the individual's right to a material basis for the liberty and the right to communicate with others through the market device of contract"⁵⁹. In this perspective, economic liberty was the true guarantee of individual liberty because property interactions were the basis for social development in Capitalist societies.

The full scope of this revolution of Constitutional analysis in terms of Free Speech jurisprudence was quickly put to the test by one of the major social phenomenon's in American history: European immigration to the U.S. This influx, fueled by a combination of expanding opportunities in the U.S. and socio-political crises throughout Europe,⁶⁰ brought not only the working masses that fueled America's economic transformation, but new political and social ideas. Communism,

⁵⁸ Ibid 72

⁵⁹ Ibid, 77

⁶⁰ Burgoon, Brian, *Immigration and Transformation of American Unionism*, 940

socialism, utopianism, anarchism, and European nationalism: all these ideas and more found support in the ethnic neighborhoods that formed the vanguard of America's rapid urbanization. As can be expected, while some Americans praised these new ideas, others saw them as a threat to what they saw as the American way of life. The widespread nature of this "patriotically" based condemnation can be seen in the influence and scope of Nativist organization of the time like the Know Nothing Party. Early on, the main targets of these efforts were Anarchists. In response to the Haymarket Riots of 1886, where several police officers were killed at an anarchist rally when somebody in the crowd threw a bomb, the Chicago press rallied behind the idea that "radicals of this kind could not come to America and abuse the precious right of free speech".⁶¹ This idea that radicals were "abusing" speech was a continuation of America's Free Speech jurisprudence that legitimized the labeling of certain ideas as dangerously un-American. Eventually, this xenophobic rejection of Anarchism led to the Immigration Act of 1903, which formally barred any individuals connected to Anarchist ideology from immigrating to the U.S. The message this law sends is clear: Anarchy doesn't belong in the United States, and neither do those that support it.

While these xenophobic policies created major conflicts, notably in the continuing struggles of the Labor Movement, the patriotism fostered by World War I provided the ideological and political capital needed to expand these efforts to previously unimaginable heights. The sweeping scope of state-based repression at this time is best represented through the Espionage Act of 1917 and the series of

⁶¹ Murphy, 74

amendments attached to it known as the Sedition Act of 1918. World War I, like the Civil War before it, established national security as the nation's absolute priority. In doing so, the need to root out and destroy any threats to that security, whether real or imagined, was of utmost importance. In particular, the Sedition Act moved beyond the Lincoln's emphasis on active government infiltration and sought to prosecute "any disloyal, profane, scurrilous, or abusive language about the form of government of the United States", which encompassed nearly any form of opposition to World War I.⁶² The act was designed not only to strike out against support of America's military enemies, but any ideological groups that hampered the ongoing war effort. Anybody outside the acceptable ideological realm, namely active support for the American war effort, was placed outside the realm of acceptable citizenship and punished.

This represented a significant expansion of existing notions of censorship because it in effect illegalized critique of American Government. In doing so, these laws provided the push that would initiate the development of Modern Free Speech doctrine. The first signifier of this shift in approach, however, did not come from the Supreme Court. Instead, it was the decision of District Judge Learned Hand in *Masses Publishing Co. v. Patten* in 1917 that would go down in history as the turning point for political speech in the United States. The case concerned the prosecution of *The Masses*, a revolutionary magazine that criticized the U.S.'s decision to enter the war and supported those who chose not to fight in it. Justice Hand overturned the arrest on the grounds that the censorship of speech should be judged not by "the justice of

⁶² Ibid, 77

its substance, nor the decency and propriety of its temper, but the strong danger that it would cause injurious acts”.⁶³ In emphasizing the effect of the words themselves, rather than the abstract ideas those words represented, Justice Hand’s decision attempted to strengthen the burden of proof necessary for the State to silence its critics. In doing so, it established a degree of causality and intentionality that had never been discussed before. Within this doctrine, it was not enough that an individual supported unpopular or perhaps even unjust acts: they had to actively be attempting to support those acts. Although the decision was eventually overturned on appeals, it laid the groundwork for one of the most important decision in United State’s Free Speech jurisprudence: *Schenck v. United States*.

The Clear and Present Danger Test and an American Marketplace

The facts of the case are relatively simple: Charles Schenck was the Secretary of the Socialist Party of America and was therefore responsible for the development and distribution of the party literature. Much of this literature was criticized the war effort, including some 15,000 leaflets sent to draftees urging them to resist the draft. In accordance with the Espionage Act, Schenck was charged with actively conspiring to undermine the U.S. war effort. Eventually, the Court upheld the decision to prosecute Mr. Schenck, deciding that the restrictions on the defendant’s free expression were legitimate in light of the ongoing war effort. In making this decision, Justice Oliver Wendell Holmes explained, “the question in every case is whether the words are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evil that

⁶³ *Masses Publishing Co. v. Patter*

Congress has a right to prevent”⁶⁴. In the eyes of the Court, seeing as Mr. Schenck was actively calling for individuals to commit an illegal activity, it was reasonable to assume that his words were used in a way that would bring about a course of action that would actively damage the war effort.

At the time, the decision hardly seemed like a step towards a new Free Speech doctrine. In fact, more liberal jurists and legal scholars like Justice Hand and Zechariah Chaffee voiced their discontent directly to Justice Holmes, seeing the decision as yet another concession to the needs of the state over the rights of the individual.⁶⁵ What was impossible to see at the time, however, was the fact that by introducing the clear and present danger test, Justice Holmes had laid the groundwork for the very expansion of individual rights that these two and many of their contemporaries sought after. The test, similar in form to that established by Justice Hand in *Masses*, created the demand for a clearer and more explicit connection between the speech being censored and the criminal activity the state was seeking to prevent. What was missing in each of these decisions was a positive justification for why this increased burden of proof was a social necessity. Justice Holmes provided just such a justification in the form of the Marketplace of Ideas.

Justice Holmes’ first use of the Marketplace of Ideas in discussing First Amendment doctrine was his dissent in *Abrams v. United States* in 1919. The defendants in the case were convicted under the Sedition Act for distributing pamphlets criticizing the decision to send a small Marine battalion to Russia as an

⁶⁴ Choper, Jesse, Fallon, Richard, Kamisar, Yale, Shiffrin, Steven, *Leading Cases in Constitutional Law: A Compact Casebook for a Short Course*, 2011 Edition, 295

⁶⁵ Murphy, 99

attempt to crush the Revolution and called for a general strike amongst workers. While similar in many ways to the *Schenck* case, there were notable differences that provided the rationale for Holmes' dissent. Most importantly, whereas Charles Schenck was actively calling for a criminal activity, the defendants in *Abrams* were only stating their strong opposition to an American policy. This separation is vital because rather than directly calling for an illegal action, thereby triggering the causal link necessary to the clear and present danger test, the defendants in *Abrams* were simply presenting an opinion that could only be connected to criminal activity through the state's more abstracted fear of domestic sedition. While the majority of the Court didn't see the relevance of this distinction, Justice Holmes, joined by Justice Brandeis, dissented in an attempt to further establish the doctrinal meaning of the clear and present danger test. As he explained, "it is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned",⁶⁶ This emphasis on the direct connection between the targeted speech and the criminal activity helped distinguish the clear and present Danger test from previous rationales for censorship because it called for the state to actively prove the existence of a link rather than demonstrating that it was reasonable to believe such a link exists. In this way, the balancing of rights shifted decidedly in favor of the censored individuals. While this explanation of the proper parameters of the test was essential in establishing the protections it offered, it was Justice Holmes'

⁶⁶ Choper, 299

inclusion of the Marketplace of Ideas that justified these considerably expanded boundaries.

The importance of the Marketplace of Ideas lies in the fact that it justified the possible political consequences of the clear and present danger test by rejecting the notion of a single, absolute political ideology. As Justice Holmes explains, tolerating opposition to political institutions based on the unquestioning acceptance of certain principles undermines the efficacy of those in power by showing that there is a possible alternative to their ideologies. However, “when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas”. This call for an open discourse as the only means of instituting effective political governance demonstrates the unique instrumental value of the Marketplace of Ideas: it rejects the idea that individuals can, on their own, develop inalienable and absolute truths. Instead, it proposes that political truths are best established by a collective decision-making process free of irrefutable truths and irredeemable untruths. This emphasis on ideological relativism justifies the jurisprudential expansion of free speech protection established by the clear and present danger test because it articulates the fact that more restrictive boundaries would hamper the pursuit of the most effective political ideologies.

By denying the existence of a single American ideology, the Marketplace entails a rejection of “othering” as a justification for political censorship. Without such the sanctification of a particular ideology as “American”, it is impossible for

certain groups to be censored as “anti-American” based on their ideological affiliations because there is no American ideology for them to violate. Even if an idea receives a little public support, this framework creates an understanding that the differences between popular and unpopular opinions are based on political circumstances, not irrefutable laws of morality. From this perspective, political deviants are seen as ideological minorities rather than unacceptable transgressors. This is a tremendous shift because it grants ideologies previously censored as foreign access to the political discourse. In this way, they are transformed from seditious aliens to true citizens. By demanding the protection of “expressions of opinions that we loathe and believe to be fraught with death”,⁶⁷ Justice Holmes’ demonstrates how the Marketplace requires the U.S. government to treat all ideologies, and those who advocate them, equally. In doing so, the Marketplace of Ideas transforms the very notion of foreignness by removing ideological parameters for American citizens.

By relying on the Marketplace of Ideas construct, Justice Holmes provided an instrumental justification that situated this new approach towards the First Amendment within the socially minded jurisprudence of the early 20th century. In essence, Free Speech became, jurisprudentially speaking, a vital part of America’s ongoing democratic experiment. In an era where progressive desires to address the social inequalities of the Industrial Revolution demanded policies be grounded in more than individualized benefit, Justice Holmes’ gave Free Speech a clear utility by

⁶⁷ Cited from Holmes’ Dissent in *Abrams*

explaining that it forced individual beliefs to be put through the rigorous competition of an open marketplace before they are accepted as truths.

Although these cases introduced new theories into Political Speech jurisprudence, it would be some time before they were accepted as doctrine. After *Schenck*, wherein both Justice Brandeis and Justice Holmes saw the state action as constitutional under the clear and present danger test, the two found themselves in the dissent for several important cases in an attempt to establish the full parameters of this new philosophy. One major example of this success in spite of failure is the Court's decision in *Gitlow v. New York* in 1925, a case often marked as the beginning of the legal process of incorporation, whereby the Bill of Rights, through the due process clause of the 14th amendment, was held to apply to the states as well as the Federal Government.

The case concerned Charles Gitlow, a socialist Senator from New York who was arrested in 1919 under the Criminal Anarchy Act of 1902 for advocating the overthrow of government by force or violence. The basis of the arrest was his pamphlet entitled *Left Wing Manifesto* that called the proletariat revolution an inevitable and praiseworthy event. The majority ruled in favor of the state, citing the traditional deferential approach that gave Legislature's relatively expansive powers of regulation that "may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise authority vested in the State in the public interest".⁶⁸ Justice Holmes, however, joined by Justice Brandeis, dissented by arguing that there was a difference between the expression of a belief and a direct

⁶⁸ O'Brien, 431.

incitement. Without the existence of a direct call or earnest attempt to transform the idea into action, the state, in their eyes, did not have the authority to strip Gitlow of his right to free speech. Again, this understanding was firmly grounded in a belief in the need to uphold the an ideologically relative Marketplace of Ideas, as Justice Brandeis was willing to go so far as to say that “if in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way”⁶⁹ This quote in particular demonstrates the way in which the Marketplace of Ideas, by rejecting the concept of an absolute American ideology, gave previously condemned ideas a new degree of political legitimacy.

Two years later, the Court again found itself face to face with anti-subversion laws targeting leftist ideologies in *Whitney v. California*. While the court unanimously ruled to uphold the conviction, Justice Brandeis wrote a concurrence, joined by Justice Holmes, that explained that, although they affirmed the ruling against Whitney, they rejected much of the majority’s rationale. One of the key aspects of this concurrence is Justice Brandeis’ argument that based on the due process clause of the 14th amendment, “the right of free speech, the right to teach and the right of assembly are, of course, fundamental rights”.⁷⁰ In labeling these rights fundamental, Justice Brandeis was placing them in the same category of protection as property rights, thereby establishing that the state needed more than a justifiable reason to restrict them: they needed to prove that speech would

⁶⁹ Ibid, 433

⁷⁰ Choper, 305

produce an imminent danger to society. Furthermore, Justice Brandeis' reiterated the need for incitement, rather than mere advocacy, to justify the censorship of opinions that Justice Holmes had laid out. Where Justice Brandeis went further, however, was arguing that the clear and present danger test, and the Marketplace of Ideas it was designed to protect, is an essential part of American Democracy. As he explains, "order cannot be secured merely through the fear of punishment for its infractions...fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies".⁷¹ This suggests that the Marketplace of Ideas' insistence on protecting individual speech regardless of the abstract ideologies allows political minorities the ability to address their grievances through the Democratic process. In doing so, it prevents the formation of dangerously un-Democratic factions that would threaten the stability of the state as a whole.

As explained above, this increased openness does create the possibility for dangerous political ramifications. As Justice Brandeis explained in *Whitney*, "every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of law-breaking heightens it still farther."⁷² Despite this, he goes on to state that the risks such actions cause are simply the price of living in a Democratic society. In accepting the possible social and political repercussions of the Marketplace of Ideas, instead of simply sweeping

⁷¹ Ibid, 299

⁷² Ibid, 305

them under the rug, these decisions in affect changed the very concept of what it meant to be a citizen. Whereas for over a century the act of articulating an “un-American” opinion was more than enough to justify a removal of that individual from the Democratic process, the Supreme Court, or at least these two Justices, were saying that these fears, although possibly warranted, had to be tolerated in order to increase the pool of ideas America draws on, thereby invigorating it’s decision making process. This willingness to accept individuals who had previously been deemed enemies of the state transforms the basis of American Democratic Identity from one that emphasizes loyalty and adherence to pre-existing traditions to a willingness to challenge, and in turn tolerate, new and sometimes offensive ideas. Far from rejecting foreignness, this concept embraces it. In doing so, these opinions shatter the very notion that there is a comprehensive American identity that needs to be protected at all costs. Instead, that identity, like the Government and society it reflects, is in constant flux.

While Justice Brandeis and Justice Holmes were forced to lay this ideological groundwork through dissents and reluctant concurrences, the political and social changes brought about in the 1930’s provided them with an opportunity to turn their ideas into jurisprudential law. Most important amongst these changes was the remaking of the Court under Chief Justice Evan Hughes, who was appointed in 1930. Led by the progressive-minded Hughes, the Court began to put the Marketplace ideas the two Justices had been developing into practice almost immediately, with important free speech cases like *Stromberg v. California*, which protected the

substantive importance of symbolic speech, and *Near v. Minnesota*,⁷³ which overturned a law limiting the dissemination of “radical” newspapers. In 1937, in *Herndon v. Lowry*, the Court for the first time overturned a state sedition law on the basis of the Clear and Present danger test. Most importantly, however, was the realization of Justice Brandeis’ argument for the establishment of Free Speech as a fundamental right in *Palko v. Connecticut*. The decision, written by Justice Benjamin Cardozo, established that Free Speech is “the matrix, the indispensable condition, of nearly every other form of freedom”.⁷⁴ In doing so, the Hughes Court had, in less than ten years, radically expanded the boundaries of what type of speech was protected under Free Speech.

The implications of these decisions on Democratic Identity cannot be overstated. For the first time in U.S. history, the state no longer had the legal authority to establish which ideas are radically un-American and which ideas are not. Strangely enough, the Court’s clearest articulation of this new American identity was given not in the reform-minded atmosphere of the New Deal, but in the fervently patriotic environment of World War II. The case, *West Virginia Board of Education v. Barnette*, concerned the refusal, on religious grounds of Jehovah’s witnesses to salute the American flag. In direct repudiation of their decision in *Minersville School District v. Gobitis* from a year earlier, the court ruled that a law compelling students to salute the flag violated the first amendment. As Justice Jackson explained, “if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics,

⁷³ Murphy, 117

⁷⁴ Ibid, 119

nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith there in"⁷⁵. This fixed star, however, was born in a time of social upheaval, when the basic tenants of American traditions of economic individualism and limited State Government were being called into question. This created an environment that welcomed new and contrary ideologies, an environment that would be directly challenged in the polarized, hyper-patriotic environment of the Cold War.

⁷⁵ Ibid, 108

History of the American Communist Movement

1917 Russian Revolution, CPA Origins, and the First Red Scare

The Communist Party of the USA (CPUSA) was not a collection of Soviet sponsored espionage agents, though many of its highest-ranking members were Soviet spies⁷⁶. At its conception, as a representative of the Communist International newly born out of the 1917 Russian Revolution, it was part of a broader progressive movement in the United States reacting against the changes in American society brought about by the Industrial Revolution. Labor, suffrage, racial civil rights: all of these had strong affiliations with Communism. At the same time, however, “the newly organized American Communist movement was made up largely of immigrants, non-citizens, and non-English speakers, reinforcing the image of communism as a foreign import.”⁷⁷ In this light, many saw Communism as an alien force inherently antagonistic to American culture, and in a way that was true.

While the roots of American Communism can be seen in the decades old labor movement, events overseas catalyzed the formation of the first American Communist Party. Specifically, the economic and political effects of World War I on the century old Euro-centric balance of power caused many leftists to claim, as the Left Wing of the American Socialist Party did, that “Capitalism, the prevailing system of society, is in the process of disintegration and collapse. Out of its vitals is

⁷⁶ Haynes, John Earl, *Venona: Decoding Soviet Espionage in America*

⁷⁷ Haynes, John Earl, *Red Scare or Red Menace?*, 7

developing a new social order, the system of Communist Socialism”⁷⁸. The harbinger of this change: the newly born Soviet Union. To many progressives, the Bolsheviks represented Communist theory come to life, a group of devoted radicals who successfully toppled the mechanisms of Bourgeoisie society and were in the process of creating a proletariat Utopia. If it could be done in Russia, one of the cornerstones of the Global Political order, why couldn’t it happen in France? Or England? Or America? It was with this frame of mind that the American Communist Party was formed. The revolutionary goals were apparent from the beginning. As stated in the party constitution, its purpose was “the education and organization of the working class for the establishment of the Dictatorship of the Proletariat, the abolition of the Capitalist system and the establishment of the Communist Society”⁷⁹ In accordance with Communist ideology, this revolution was to be part of an international political revolution, and as such American Communists were more than willing to accept foreign influence. This aid, more often than not, came from the leaders of the Soviet Union, as they were the recognized leaders of the Communist International.⁸⁰ This influence was immediate, as demonstrated with the Zinoviev Letter in 1920. Written by Gregory Zinoviev, a close associate of Lenin, it reprimanded the American Communist movement for splitting into two separate

⁷⁸ Stated at a National Council of the Left Wing of the Socialist Party in a statement drawn up in New York City on June 21, 1919, Cited from Fried, Albert, *Communism in America: A History in Documents*, pg. 28

⁷⁹ The Communist Party Manifesto was ratified at a meeting of 128 representatives from the former Socialist Party on August 31st, 1919 Cited from Fried, 33

⁸⁰ As established through the creation of the predominantly Soviet “Comintern” in 1919 to claim leadership of world communism, subsequently recognized as the leadership committee of the Third International, *Columbia Electronic Encyclopedia*, 6th Edition, Feb 2013

organizations, explaining in explicit terms “the Executive Committee categorically insists on this being immediately about.”⁸¹ Under this external pressure, the Communist Movement united under the Communist Party of America, (CPA) demonstrating the beginning the link between the American Communist movement and the Soviet Union that would define their relationship to American Politics.

This explicit between the CPA and the Soviet Union is part of a larger process by which the Party’s identity was, from the outset, directly connected in large part to foreign political developments. Fueled by Communism’s emphasis on breaking down national barriers in order to unite the workers of the world into a single proletariat force,⁸² the CPA had little reservation in directly connecting itself to non-U.S. interests. This is of particular importance to their relationship with government censorship because it situated them outside the general American citizenry. Their platforms, at least in part, was often times based on the interests of Communist countries around the world rather than strictly the American working class. In doing so, they in a sense invited the question that would fuel American anti-communist efforts: can a real American citizen place the needs of other countries above the needs of the U.S.? While such a simple question ignores the fact that the Communist Party saw their international-minded actions as a way of liberating the American working class, it does illustrate the pervasive sense amongst the American public that Communists were inherently political outsiders whose loyalty to the U.S. was suspect at best.

⁸¹ Cited from Fried, 35

⁸² Waterman, Peter, *The Forward March of Labour (and Unions?) Recommended: Reflections on Emancipatory Labour Internationalism and International Labour Studies*

The newly formed Party knew this foreign identity could undermine their efforts at political action, and they quickly realized that in order to have any tangible success in the U.S., they would have to embrace electoral politics to a degree that the more militant Communists of Russia was sternly against. Although the ultimate goal of creating a “proletariat dictatorship” was the same, they realized “the importance of election campaigns in developing the political consciousness of the working class”⁸³ in the United States. In this way, the CPA was hoping to maintain its relationship with the larger Communist International while simultaneously embracing a distinct American identity by joining in on the U.S. democratic process. The immediate problem they faced, however, was the fact that following the end of World War I, the perceived threat of Communist subversion was beginning to become a nation-wide phenomenon. The First Red Scare had begun.

While American Leftist intellectuals and activists saw the Russian Revolution as the start of a new egalitarian global order, American conservatives, and indeed much of the American public, viewed it as a threat to traditional American society. The Soviet’s stern opposition to organized religion and rhetorical focus on the elimination of individual property rights in particular went against some of the core aspects of American political thought.⁸⁴ Furthermore, while foreign in nature, “in the United States too there seemed to be signs of radical upheaval”⁸⁵. From police strikes in Boston to bombing campaigns targeting major financial and political figures like J.P Morgan and Attorney General Mitchell Palmer, all of which

⁸³ Program and Constitution, Workers Party of America, Cited from Fried, 40

⁸⁴ Haynes, 7, *Red Scare or Red Menace?*

⁸⁵ Ibid, 8

explicitly had some ideological connection to certain Communist and Bolshevik organizations,⁸⁶ many politicians and members of the public began to fear that Domestic Communists had already begun the process of dismantling America's economic and political culture. It was in this environment that the state censorship apparatus developed by the Espionage Act of 1917 and the Sedition Act of 1917 in order to prevent anti-war efforts turned its attention to domestic Communism. Before it had even been formally created, the American Communist movement was already an enemy of the state in the eyes of the American Government.

This antagonistic relationship with American Communism reached its height with the Palmer Raids in early 1920. Organized by Attorney General Mitchell Palmer, with the help of a young J. Edgar Hoover, a series of raids were conducted in 33 cities across the country targeting various Communist organizations in response to the aforementioned bombing campaigns. The raids were part of Attorney General Palmer's attempt to completely remove from America any sentiment of Revolutionary Communist ideologies, and with this goal in mind more than 5,000 individuals were arrested within 48 hours of the first raid.⁸⁷ Palmer justified the scope and speed of the operations, which entailed arrests without warrants, interrogations without lawyers and numerous other violations of civil liberties, as necessary in light of the existential danger these revolutionaries caused. Perhaps most revealing was Palmer's keen interest in deporting many of those arrested, demonstrating the connection between anti-communist sentiments and an attempt to keep America pure of "foreign" ideologies. At first, much of the national and local

⁸⁶ Ibid, 8

⁸⁷ Cohen, Stanley, *The Political Career of A. Mitchell Palmer*, 360

media accepted this explanation and applauded Palmer's actions.⁸⁸ This support was so great that Palmer, long suspected of having an interest in higher office, used it as a springboard to announce his candidacy for the 1920 Democratic Presidential Nomination before any of his challengers.

This support would be short lived, as soon the Palmer raids became a flashpoint for a national debate on civil rights. While the American left almost immediately came out against the Palmer Raids as a violation of individual civil liberties, it was not until the scope of these violations were made public that the critics of the raids gained broad support. Although legal challenges and media criticisms quickly increased, the most consequential aspect of this opposition was the decision by Assistant Secretary of Labor Louis Post to reject Palmer's deportation requests. The ensuing conflict between Palmer and Post led to a Congressional hearing that, while punishing neither, disrupted the national view that the raids were necessary, instead framing them as a border-line totalitarian response to a threat that was more illusory than real.⁸⁹ This view was reinforced by the relative failure of Communism to spread beyond the borders of Russia. Although it became increasingly clear that the Communist Government in Russia was here to stay, Communist movements in Germany, Hungary, Bavaria, Latvia and Finland failed to gain permanent traction.⁹⁰ In this way, domestic violations of civil liberties, combined with international geopolitical developments that diminished the threat of Communist invasion less pervasive, made the paranoia of the Red Scare seem not

⁸⁸ Mooney, M., *Red Scare! The Palmer Raid and Civil Liberties*, 19

⁸⁹ Donald, 367

⁹⁰ Haynes, 9, *Red Scare or Red Menace*

only unjust, but also unnecessary. This pattern would repeat itself over thirty years later in response to the second Red Scare.

The Great Depression and New Opportunities

Despite the fact that Communism was no longer the singular target of Government censorship, the Communist Party of America remained a relatively marginal organization throughout the 1920's. This was in large part due to the fact that "the economic crises, which had seemed so promising in the immediate aftermath of the Great War, had given way to booming prosperity, as the 'second industrial revolution' came into its own and Wall Street began its vertiginous climb beyond all limits".⁹¹ With Capitalism seeming to be functioning better than ever, the Communist message failed to resonate with large segments of the population. In light of these developments, there was a broader movement within International Communism to "shed their revolutionary image, take part in the bourgeois political process,"⁹² so as to order to influence working class politics despite the lack of a comprehensive proletariat consciousness. For American Communism, this meant integrating the still forming American Communist Party into the Third International along Bolshevik principles while simultaneously expanding their political connections to more moderate sectors of the American Left, like Socialist parties and labor unions. In doing so, the Communist Party hoped that they would be able to gain a degree of electoral and economic influence despite their relatively small numbers. This willingness to work with non-Communist organizations was key to

⁹¹ Cited from Fried, 21

⁹² Ibid, 17

their early successes in organizing strikes for smaller labor groups like the United Textile Workers⁹³. This limited scope would change, however, with the Great Depression.

With Capitalism in the throes of the type of crisis that Communists had long predicted, the American Communist Movement was able to expand its scope to previously impossible heights. From the success of the Communist-organized Unemployed Councils in effectively rallying jobless individuals to lobby for social security, cheap housing, and unemployment insurance,⁹⁴ to the founding International Worker's Organization in 1930, thereby challenging the existing profit-based insurance industry,⁹⁵ the Communist movement developed the type of organizational structure and influence that allowed it to develop as a force in Depression-era politics. The key to this turn around was that the widespread poverty in America gave Communism a newfound relevance when addressing American audiences. Hoover, despite passing policies based on targeted government intervention, was defeated in the election of 1932 by FDR's promise of a Government that would reign in the private practices that caused the economic collapse. The specter of an expansive Federal government regulating private industry, one of the cornerstones of American critiques of Communism, seemed less anti-American than in the economic boom years of the twenties. This was an essential step in the CPA's development as a legitimate member of the American political community because it gave them ideological connections to existing

⁹³ Ibid, 21

⁹⁴ Ibid, 99

⁹⁵ Sabin, Arthur J., *In Calmer Times: The Supreme Court and Red Monday*, 61

political organizations, in particular the Democratic Party. In doing so, it made their ideology, although still generally rejected, a legitimate part of America's ideological spectrum rather than an alien outlier disconnected from U.S. political culture.

The Popular Front

Although the economic challenges brought about by the Great Depression played a key role in legitimizing the CPA, it was actually the threat of German Fascism that allowed the American Communist Movement to reach to its political peak. The Soviet Union sought to shore up alliances with other countries to help contain Nazi Germany, so in 1935 they initiated the "Popular Front" program. It called for expanding the scope of Communist activity by reaching out to more moderate liberal groups, hoping "that unity of action be established between all sections of the working class, irrespective of what organization they belong to." ⁹⁶ The CPA followed the Soviet's lead, as they decided to join in the broad New Deal coalition under FDR ⁹⁷ under a larger shift designed to show that, as Party secretary Earl Browder claimed, "Communism is the Americanism of the 20th century." At the same time, however, this attempt to implant the Communist Party into American politics entailed a certain degree of separation from the Soviet Union. Only by doing so could the party be fully embraced as an American entity, something even the Soviet high command understood.⁹⁸ In order to do so, the CPA began to actively emphasize its patriotism and the role it played in protecting American democracy.

⁹⁶ From the proceedings of the Seventh Comintern Congress, held on July 25th, 1935

⁹⁷ Haynes 13

⁹⁸ Belknap, Michael R., *Cold War Political Justice: the Smith Act, the Communist Party, and American Civil Liberties*, 44

Most strikingly, the party in 1939 broke with the Communist International with little controversy, beginning the shift towards a uniquely Americanized version of Communism.

By increasing the scope of political acceptance, the CPA not only reached 70,000 members in 1939, but a majority of them were native born. Between the shift in ideological support of the U.S. and a growth in native-born members, the CPA had an opportunity to undo the widely perceived notion that the party was a “fifth column” of sorts. Across the country, Communist Party’s presented themselves not as irreconcilable radicals, but as the “left wing” of the New Deal coalition, and they subsequently gained powerful footholds in state-level government in New York, California, Minnesota, and Washington.⁹⁹ Additionally, they became a dominant force in the Congress of Industrial Organizations (CIO), eventually gaining complete control of the United Electrical Workers. These successes indicate a continuation of the change in the way in which the Communists saw themselves and how Americans as a whole saw them that was initiated by the Great Depression. For the CPA, the Popular Front’s emphasis on ideological compromise allowed them to further integrate themselves within the American political system while simultaneously maintaining their Communist identity. Alternatively, this emphasis on participation with American society rather than active revolution against it diminished the sense amongst the American public that Communism was by definition antagonistic towards American ideals. In this environment, the idea of a

⁹⁹ Irving, Howe, *American Communist Party: A Critical History*, 115

loyal American citizen who just so happened to be a Communist was becoming less and less far fetched.

The problem with this development is the fact that it was ultimately more dependent on the geopolitical relationship between the U.S. and the Soviet Union rather than ideological changes within Communism or American political culture. The Popular Front, for all of its ideological explanations, was based on the Soviet Union's fear of the military might of Nazi Germany. This is part of the larger fact that for all the independence the CPA had, it was still in effect the American branch of the Third International controlled by the Soviet Union: The fact that the CPA waited until the Soviet Union gave them the authority to develop a distinct American political identity demonstrates for them to do just how pervasive the Soviet perspective was in defining the Party's actions. The challenges this created for the CPA's attempts to integrate themselves into American society were clearly demonstrated by the political fallout they faced after the Nazi-Soviet Pact in 1939.¹⁰⁰ This treaty, which refuted the basic tenants of the Popular Front, required a shift in the policy of the Soviet Union, and the American Communist Party followed the lead. As the Party quickly explained, between the Nazis trail of military conquest and the British and French policy of appeasement at the cost of Eastern European countries, the conflict was in reality "an imperialist war for the Bourgeoisie of all belligerent Powers"¹⁰¹. Therefore, the only justified policy was non-aggression. When the U.S. actively declared war against the axis powers following Pearl Harbor, this policy

¹⁰⁰ Ibid, 18

¹⁰¹ Communist Party Political Committee, *America and the International Situation*, issued November 1939, Cited from Fried, 315

quickly cost them much of the political influence the Popular Front had given them. Losses at the state level across the country decimated their electoral influence, and even in the CIO, where Communist held some of the highest positions, the CPA's anti-FDR platform would have led to their expulsion were it not for the actions of CIO president and long-time CPA ally John Lewis. The Soviet Union, after becoming a possible ally, had been transformed into the "Red Fascist", as Communism becoming synonymous with Fascism in mainstream American Politics. Even President Roosevelt, the architect of the New Deal the CPUSA had spent nearly a decade supporting, reacted against this dissension, imprisoning Browder in 1941 for passport irregularities from a trip to the Soviet Union. Of more long-lasting importance was the passage of the Smith Act, which would eventually become the centerpiece of Government Communist censorship during the heights of the Cold War Red Scare.

This antagonism, however, completely reversed course on June 22nd, 1941, as Hitler violated the non-aggression pact and invaded the Soviet Union. Subsequently, the Soviet Union joined the British and the U.S. in declaring war against the Axis powers, and fear of the Red Fascists transformed into admiration for Uncle Joe. With the Soviet Union behind the war, the CPA returned to their Popular Front position of unity with the broader liberal wing of American Politics. In fact, the Soviet's need for U.S. military assistance led the CPA to actively working with the military industry to maximize U.S. arms production. The Party was devoted to the mission of International Communism with the Soviet Union as the vanguard, and with this in mind, anything to help the American war effort was seen as a necessary action to

fight fascism and protect the future of the proletariat.¹⁰² They even went as far as to suppress strikes in such arms factories. Despite the protests of Social Democrats and other union supporters, Earl Browder decidedly explained that Communism did not require the support of all strikes.¹⁰³ In times of war, Browder, and the CPA as a whole, claimed that labor strikes in key industries was too damaging to national security to be tolerated. This represented a marked shift in the policy of the Communist Party as they were now willing to go as far as to support the very Capitalist industries that they had for decades worked to undo. As the war went on, the CPA proved to be one of the most hawkish factions of American politics, giving them a degree of nationalist legitimacy they never had before.

The push behind the re-alignment of American perceptions of Communism, and Communist perceptions of America, were not borne solely out of military necessity. While this was the catalyst for the formation of this new relationship, the possible benefits of a continued alliance were not lost on the two powers. With the ideological differences that separated them momentarily pushed apart, the benefits of close relations seemed greater than the dangers of open hostility. In turn, each side made a number of moves intended to appease and deepen this bond. On the American side, FDR, partially out of fear of domestic subversion and partly out of a desire to keep American Communism in the hands of Soviet-aligned Stalinists, openly persecuted Trotskyites and other further-left members of the Communist movement.

¹⁰² Belknap, 37

¹⁰³ Browder, Earl, *War or Peace With Russia?*, 120

From the other side, the Soviet Union disassembled the Communist International in 1943, thereby foregoing their symbolic mission of world revolution. Not only did this assuage the fears of some Western leaders, but it also created a sense in the CPA that the party, while still strongly connected to Stalinist principles and the needs of the Soviet Union, could make it a distinctly “American” party. There were no stronger proponents for this than CPUSA Earl Browder, the Kansas native who saw a post-war alliance between the U.S. and the Soviet Union as the greatest hope for the realization of Communism. This view, however, quickly became a serious liability as International politics once again forced a dramatic change in the American Communist movement.

The Red Scare

Rise of the Cold War

As World War II came to a close, the military-alliance gave way to jockeying between the U.S. and the Soviet Union for division of Europe. The Soviet Union, looking to create a buffer between itself and Western Europe, sought to seize control of Eastern Europe. The U.S., on the other hand, sought to protect its own economic interests in the area while promoting Democratic governance in the newly liberated areas. This marked a new phase in the relationship between the Soviet Union and the U.S. Before the rise of Nazi Germany, the two were antagonistic forces largely for ideological reasons: Americans feared the Soviets push for International Communism and the Soviet's regarded the U.S. as stakeholders in the system of global Imperialism. After the war, however, with the two slowly realizing that they were now the world's only superpowers, their ideological differences now coincided with diverging geo-political aims. This in turn led to drastic changes in the policies of both nations as they sought to do away with the ideology of cooperation in favor of one that would support their newly found roles as global competitors.

On the American side, President Truman committed early on to framing the growing conflict with the Soviet Union as a moralistic battle between Communism and Democracy. Although President Roosevelt spent much of the war trying to develop an effective working relationship with Stalin, shortly before his death he

began to fear the Soviet's ambitions in Eastern Europe and beyond.¹⁰⁴ President Truman picked up these suspicions and quickly came to regard the Soviets as a serious threat to U.S. global interests. He also understood that America, a historically isolationist country, would not begin an all out conflict with the Soviets if they didn't feel their conscience or their well being demanded it.¹⁰⁵ With this in mind, Truman quickly began a popular campaign aimed at categorize the Soviets, and Communism as a whole, as direct enemies to freedom and democracy. As he explained to a Joint Session of Congress, "at the present moment in the world, nearly every nation must choose between alternative ways of life....one way of life is based upon the will of the majority, and is distinguished by free institutions, representative government, free elections, guarantees of liberty, freedom of speech and religion, and freedom from political oppression. The second way of life is based on the will of a minority forcibly imposed on the majority. It relies upon terror and oppression, a controlled press and radio, fixed elections, and the suppression of personal freedoms"¹⁰⁶ This speech introduced the world to the Truman Doctrine, a policy based on supporting anti-communist governments and movements around the world.

This principle formed the backbone of what soon came to be known as Containment, a policy idea coined by U.S. diplomat George Kennan in 1946¹⁰⁷. In essence, the policy rejected the principle of direct confrontation with Communism in favor of a focus on preventing its expansion in whatever ways possible. Kennan

¹⁰⁴ Haynes, *Red Scare or Red Menace*, 53

¹⁰⁵ Sabin, 31

¹⁰⁶ 1947 Speech to Joint sessions of Congress

¹⁰⁷ First articulated by Kennan in what has since become known as the Long Telegram, a memo sent to heads of the State Department in July 1947

believed that without increased access to new markets and political resources, the Soviet Union's planned economic system would ultimately cause its own internal collapse. In order to facilitate this, the U.S. had to make sure that Communism did not gain political footholds around the world by whatever means necessary. The most significant manifestation of this policy in the early days of the Cold War was the Marshall Plan. Passed in 1948, the plan called for the U.S. to provide over \$13 billion in relief to Western European countries over four years in order to restore their economies after the internal devastation brought about by World War II. Although the U.S. had economic incentives for the plan, seeing as Western Europe was their largest trading partner, the underlying justification was a fear that the depressed economic conditions in these countries would create political opportunities for Communist movements. Soon this economic support turned into military partnership, as in 1949 the North Atlantic Treaty Organization, or NATO, was created as a way of setting up a cohesive defensive network against the threat of possible Soviet invasion.

Focus on Domestic Communism

Although these policies were largely aimed at foreign countries, President Truman's placement of the battle against Communism into moralistic rather than just strategic terms created a widespread domestic hostility towards Communist ideology as a whole. The Soviet Union and Communism became inseparable in the eyes of the American public and policy makers alike, and President Truman saw a political opportunity to shore up his anemic approval ratings by presenting himself as a strong defender of American democracy in the face of Communist expansion

around the world.¹⁰⁸ This need to strengthen his anti-Communist credentials, and the credentials of the Democratic Party as a whole, became more paramount following 1946 when the Republicans gained control of the House of Representatives. Soon Congressional Republicans began to not only criticize the foreign policies of the Truman Administration, but also directly call their loyalty into question by arguing that they were actively protecting domestic Communists.¹⁰⁹ These claims, partially a response to the long-held hostilities in the Republican Party to the policies and administrative strength of the New Deal Coalition,¹¹⁰ came to dominate the domestic political environment. Communism was no longer the far-left wing of American politics as they were during the 1930's, or even the hawkish patriots of the 1940's, but seditious aliens forming a dangerous fifth column for an inevitable Soviet invasion.

This emphasis on the connection between domestic communism and foreign sabotage can clearly be seen in a number of policies Truman pushed through in 1947, most notably executive order 98035, which created the Commission on Employee Loyalty. The Commission pioneered what would soon become one of the hallmarks of anti-Communist efforts in public and private institutions across the country: loyalty oaths. These oaths, although varying based on the organization requiring them, made "membership in, affiliation with, or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist,

¹⁰⁸ Belknap, 20

¹⁰⁹ Sabin, 28

¹¹⁰ Belknap, 42

communist, or subversive....seeking to alter the form of government of the United States by unconstitutional means” grounds for dismissal. This loyalty program, which investigated over two million government employees, directly connected membership and sympathy with Communist parties to anti-Americanism, re-institutionalizing the policy of treating communism as a foreign entity that the CPA had been working against for over a decade. This desire to isolate, control, and ultimately disassemble domestic Communist organizations was pursued to an even greater degree by House Republicans, as demonstrated by the Nixon-Mundt Subversive Activities Control Act of 1948. The bill, which ultimately didn’t pass, would have made the Communist Party an illegal entity and required all members to register with the government their loyalty to foreign powers.¹¹¹ This was not the sentiment of politically isolated, ideological bomb throwers: by April 1947, as Gallup polls indicate that 61% of Americans wanted to outlaw the CPA.¹¹² Communism, which only a few short years earlier was a powerful player in Democratic Party politics across the country, had suddenly become so foreign to American traditions that it had become a recognized enemy of the state.

This proliferation of domestic anti-communist laws was indicative not only of a growth in American’s embrace in the diametric opposition between Americanism and Communism, but also a sense that domestic communism represented a legitimate threat to the security of the United States. Despite the fact that the CPA at the time number less than 50,000 people, 10% of Americans believed they had enough strength to dominate American government, while

¹¹¹ Sabin, 40

¹¹² Belknap, 43

another 35% believed that they were in control of vital sectors of the economy and were getting stronger all the time.¹¹³ With the widespread fear of an inevitable World War III between the U.S. and the Soviet Union,¹¹⁴ the relative weakness of the CPA did little to assuage fears of their dangerous capabilities. In such an environment, domestic Communists were not fellow citizens but enemy combatants.

There are multiple reasons for this outsized fear of Communist subversion. One was the fact that Republicans quickly seized on the subversion issue as a way of undermining the Democratic Party's anti-communist credentials. It cannot be forgotten, however, that Truman himself played a large part in creating the type of atmosphere that fostered this paranoia by justifying his foreign policy in terms that made Communism anywhere, including the U.S., an active opponent of American democracy. In doing so, Truman gave the Republicans a valuable tool that they could use to call into question the patriotism of any Democratic official. This would become one of the cornerstones of Republican attacks on Democrats until the 1952 election when they gained control of the White House, most notably by Senator Joseph McCarthy. In effect, Truman's declaration of an all out moralistic war on Communism wherever it sprung up, including the U.S., created an political arms race where Republicans and Democrats did everything they could do demonstrate their own patriotism while assailing that of their opponents across the aisle.

¹¹³ Ibid, 44

¹¹⁴ Hoffman, Elizabeth Hobbs, "Come Home America", *The New York Times*, March 4, 2013

Changing Threats in a Bipolar World

Despite the importance of these domestic political battles in the rise of this national paranoia, developments abroad also played a key role in amplifying these fears. The first such moment was the removal of the Czechoslovakian government by a Communist revolution in 1948.¹¹⁵ This was compounded by the formal collapse of Chiang Kai-shek's government in China and the formation of the Communist People's Republic of China under Mao Zedong on October 1st, 1949. Overnight, almost a fifth of the world's population had become Communist, and now the entire South Pacific region was ripe for Communist expansion. Journalists and politicians around the country were asking, "how we lost the East".¹¹⁶ It seemed that Communism was on the march and that only an active American intervention would prevent the complete collapse of Democracy.

The fear these events inspired, however, paled in comparison to the Soviet's first successful testing of an atomic bomb on August 29th, 1949. Not only did this end the U.S. monopoly on such weapons, which previously guaranteed it overall military supremacy, but it also exponentially increased fears of domestic subversion due to the fact that the Soviet's gained the U.S. guidelines from espionage efforts in England.¹¹⁷ With this realization, America's greatest fear was realized: the Soviet's had an active network of spies that were able to infiltrate the highest levels of the Western governments. With this squarely in the minds of the American people,

¹¹⁵ Sabin, 56

¹¹⁶ Quoted from Truman Administration Briefing on the Chinese Revolution issued in August 1949 called the "China White Papers"

¹¹⁷ Kaiser, David, "The Atomic Secret in Red Hands? American Suspicions of Theoretical Physicists During the Early Cold War", 55

Communist subversion became a serious threat to American security in the eyes of American voters and politicians alike. In this atmosphere, the separation between advocacy and incitement that Brandeis and Holmes articulated mattered little: with spies at every level and Communism on the move across the globe, Communism had to be completely eradicated in order to be stopped.

The American Communist Movement and the Red Scare

The End of the Popular Front

Just as the changing relationship between the Soviet Union and the United States after World War II led to an increase in U.S.-hostility towards domestic Communism, so too did it cause the CPA, and International Communism as a whole, to denounce the expansive ideological scope of the Popular Front. In the Cold War world, there was no room for political alliances with political moderates. Philosophically, this was a relatively easy maneuver to make: with German Fascism defeated, once again the greatest threat to the success of the proletariat revolution was the forces of Capitalist Imperialism. Politically, however, the shift would be much more problematic, particularly in the U.S., where the Popular Front had led the CPA to actively promote a new “Americanized” view of Communism that could work within Capitalism.

The most notable leader within this movement towards Americanized Communism was Earl Browder, the Party’s general secretary who saw a possible U.S.-Soviet alliance as the cornerstone of any peace in the post-war world. Although the war had ended, Browder still saw the maintenance of peace as the key to any political progress, arguing “any system of ideas which obstructs a durable peace has something basically wrong with it.”¹¹⁸ Committed to the broad ideological umbrella created by the Popular Front, Browder emphasized the need to “unite persons of the most diverse ideological views and interests”. This view, which had just a few years

¹¹⁸ Browder, 65

earlier been the policy of both the United States and the Soviet Union due to wartime necessities, was no longer tenable. When the Soviet leadership commanded him to adopt their antagonistic, ideologically restrictive policy, he refused. Instead, he decided to dissolve the CPA and make it the Communist Political Association. By branding the organization as a political association rather than a party, Browder hoped to initiate his vision of Americanized Communism through political grassroots lobbying efforts rather than the confrontational, uncompromising stance the Soviets were pushing for.¹¹⁹ In effect, Browder was trying to further move away from a Internationally-defined Communist movement to one that could respond to changing political realities in the United States. By doing so, he initiated a chain of events that would drastically change the face of the party.

Soviet-style Communism, and particularly under Stalin, was based on a strict hierarchy. In this structure, leaders at various levels passed down political and philosophical edicts that had to be accepted by those lower than them, a result of the state's emphasis on the scientific, absolute nature of Communist ideology.¹²⁰ Therefore, when Browder refused to follow his orders and continued to push for a U.S.-Soviet alliance, he went against one of the cardinal rules in the party. The response was swift: in April 1945, Jacques Duclos, a ranking member of the French Communist Party, wrote a piece chastising Browder for promoting expanded political influence rather than ideological purity.¹²¹ Re-published in the *Daily Worker*, one of the main American Communist publications, the letter signaled to

¹¹⁹ Starobin, Joseph Robert, *American Communism in Crisis*, 61-63

¹²⁰ Ibid, 40

¹²¹ Duclos, Jacques, "On the Dissolution of the Communist Party of the U.S.A.", *The Daily Worker*, May 24th 1945, Cited from Fried 344

foreign and domestic critics of Browder's policies that the Party leadership wanted the removal of Browder. Most notable of these attacks was from William Z. Foster, Browder's long time intra-party rival. In a special convention in New York City of the CPA, Foster gave a blistering attack on Browder, accusing him of revisionism to Communist philosophy and denying that Browder had any role in the party's successful wartime policies,¹²² the beginning of the movement's internal debate over "Browderism". In the ensuing months, more and more members, realizing the international and internal pressure being brought to bear on Browder, began to side with Foster and labeled the Secretary a dangerous revisionist. By June 18th of that same year, Browder's fate had all but been decided, and on June 20th in a vote of 53 to 1 by the National Party Committee, Browder was removed as secretary and replaced by Foster. Shortly thereafter, the Communist Political Association was re-organized as the Communist Party of the United States of America, the CPUSA.

This was only the beginning of the ideological purge, however, as members were either removed for accusations of Browderist sympathies or came forth with apologies for their past transgressions against the party. Countless ranking officers of the party from around the country were called forth before the National Committee to testify on their collaboration with Browder, and time and time again individuals who had for years publicly supported Browder apologized for succumbing to his "opportunistic" and "revisionist" interpretation. Often their apologies centered on a sense of fear in defying him, a product of the cult of personality that Stalinist Communism emphasized in national leaders. As one

¹²² Ibid 345

witness later stated, “grown-up men and women, none of them subject to physical compulsion and all of them free at any moment to walk forever out of the party headquarters, rose to beat their chests, to weep and grovel for having followed Earl Browder”.¹²³ This internal crusade against Browderism exemplified one of the CPUSA’s tendencies that would play a major role in its decline and ultimate demise: a strict adherence to leadership and little tolerance for dissent. Long a party based on strict ideological unity, where ideological divisions were seen as an assault on traditional Marxist-Lenin principles, the post-war era saw this desire become an all-consuming demand. As American-Soviet tensions increased, the Party’s growing antagonism with the American Government demanded that those within the party be absolutely committed to Soviet-style communism and totally reject the system of American Capitalism. This rather un-democratic internal identity would grow more pronounced as the Cold War developed, reaching its zenith during the party’s efforts to resist McCarthy-era attacks in the early and mid 1950’s.

These radical internal changes from the Browder administration to the Wallace administration quickly led to noticeable shifts in the party’s approach towards the U.S. government. Whereas the *Daily Worker* and other party-affiliated publications hailed President Truman as a defender of international progressivism in early 1945, by the end of the year he became “an indecisive figure tending to make certain concessions...to the reactionaries.”¹²⁴ Soon this condemnation of reactionary forces within American politics gave way to the Party’s proclamation that America, from top to bottom, was on the way to a fascist government along the

¹²³ Dodd, Bella, *School of Darkness*, pg. 182

¹²⁴ Ibid, 454

lines of Nazi Germany.¹²⁵ This declaration, partly based on the Soviets need to rationalize their military hostility towards the U.S. along philosophical grounds, was a response to the growth of domestic anti-communist measures across the country. This “red-baiting”, as critics called the measures, was a particularly significant development to those in the Party because it demonstrated the Government’s active hostility towards Communist ideology. Between Soviet demands for ideological unity with the International Communist community and domestic repression at the hands of the state, the Communist Party quickly shifted from a willing member of the New Deal coalition to a fervent critic of both parties and the U.S. government as a whole.

The dizzying speed with which Browder went from adored Secretary to ideological traitor is yet another demonstration of the CPUSA’s insistence on emphasizing its Soviet rather than American identity. From a political perspective, Earl Browder was an ideal leader for Communism in the post-war world. Born in the heart of Kansas, much of his time as the General Secretary of the CPUSA was dedicated to proving that Communism was in fact coherent with traditional American principles. Such a stance, if adopted by the CPUSA, could have helped combat the ever-expanding sentiment that Communism, and Communists, were inherently foreigners hostile to U.S. culture. Instead, however, the Party accepted the signals sent by the Communist International and enacted a platform of open antagonism towards the United States government as a whole. Whether or not the members of the party had any real control in this matter is up for debate

¹²⁵ Starobin, 125

considering how much funding the CPUSA received from the Soviet Union. What it does demonstrate, however, is that at the end of the day, the CPUSA placed more importance in aligning themselves with the policies of the Soviet Union than in developing a unique identity based on both Soviet and American interests. Indeed, the removal of Browder from office would eventually become a central tenant of the Federal Government's attempt to demonstrate that the CPUSA was designed to subvert the U.S. government in the *Dennis* trials.¹²⁶

Taft-Harley Act and the Progressive Party of 1948

The tensions these changes created reached a breaking point in 1947 with the passage of the Taft-Harley Act. The law required, amongst other things, that all unions registered with the National Labor Relations Board's (NLRB) collective bargaining agents had to sign an affidavit swearing there were no Communists in their organization. If members of the party agreed to sign the affidavits, then they open themselves to be to perjury charges. Alternatively, if they resigned from their posts, they would lose their most critical power base, as their leadership in the CIO was the key to their political operations across the country.¹²⁷ The idea of removing Communists from the ranks of industrial labor was based on a fear that they would initiate "political strikes" aimed at sabotaging the American economy rather than advancing the interests of the Union members.¹²⁸ This represents a continued manifestation of the sense that Communists were inherently dangerous and could

¹²⁶ See Part I of the decision in *Dennis v. United States*

¹²⁷ Cosser, Lewis, Hower, Irving, *The American Communist Party: A Critical History*, 465-466

¹²⁸ Brown, Emily Clark, Millis, Harry, *From the Wagner Act to Taft-Harley: A Study of National Labor Policy and Labor Relations*, pg. 206

not be trusted in affairs concerning American interests. As such, they had to be removed from the mechanisms of power and influence. As one historian stated, "Once outside the protection provided by mainstream labor and liberal institutions, American communists faced isolation and near annihilation."¹²⁹ By removing the Communists from the ranks of Big Labor, anti-Communists forces were trying to remove them from America's economic and political life. The implication is clear: these are not citizens; these are dangerous foreign agents of Soviet sabotage that need to be stopped.

Initially, the CPUSA, although fearful of the consequences of the Taft-Harley Bill, were relatively confident that CIO president Philip Murray's long-standing interest in organizational unity would keep him from embracing the bill and forcing the member unions to sign the affidavits. Despite the continual efforts of more conservative forces within the CIO, Murray was afraid to sacrifice the efficiency and national network the Communists had to offer. In this vein, Murray ordered unions across the CIO to protest the Taft-Harley Act's demands for affidavits.

This unity within organization was put under a great deal of strain, however, when some of the larger unions began to push out Communist members and sign the Taft-Harley affidavits on their own. In particular, Walter Reuther, the anti-communist president of the United Auto Workers who had long been held in check by Communist allies on the UAW's leadership board, removed his opponents from the Union in November 1947 and announced his intention to sign the Taft-Harley

¹²⁹ Haynes, *Red Scare or Red Menace*, 136

Amendment.¹³⁰ This development was part of a larger change within the CIO that called for allowing individual unions to determine independently whether or not to sign the Taft-Harley Amendment. Chairman Robert Denham of the NLRB's echoed this sentiment, making Murray's attempt to present a united front all the more difficult. This was a serious threat to the CPUSA's strength in the CIO because their strategy had always depended on a control of national leadership rather than broad-based support within the constituent unions. In light of the relatively small membership of the CPUSA, it was these close relationships with figures like Phillip Murray and former president John L. Lewis that allowed the Communist party to exert control over the actions of the Unions in the organization. With the leadership essentially cut off from each individual union's decision-making process towards the Taft-Harley affidavits, the Communists were in serious danger of being pushed out of the CIO by changes in the rank and file.

With this outcome in mind, the CPUSA decided to break from the CIO and the Democratic Party as a whole and support the newly formed Progressive Party under Henry Wallace in his candidacy for president in 1948. This decision cemented their separation from the CIO because it directly countered the organization's long-standing support of the Democratic Party's New Deal coalition. The Communists, seeing their power base in labor slowly fade away, now turned to popular politics in the hopes of maintaining their political relevancy.

Beyond the growing sense of isolation from the CIO, there were a number of other factors that drove the CPUSA to support the Progressive Party platform. One

¹³⁰ Starobin, 168

of these was the continuing sense that the Democratic Party, which the Communist Party had supported from within for over a decade, was squeezing them out as the Red Scare picked up steam. Exacerbated by foreign demands by the International Communist Comintern to distance themselves from the major parties in the U.S.¹³¹, the CPUSA began to sense that the only hope they had for influencing policy and the broader promotion of a proletariat consciousness in the U.S. was through a functioning political party that would allow them to independently insert their ideology into the political arena. With indications coming from the Comintern abroad that direct action was necessary in the face of growing suppression, the CPUSA felt this desire was in line with international Communist trends. Furthermore, the successes of independent candidates across the country in local and state elections gave the leadership of the CPUSA a sense that there was a political opportunity for them to establish an ideological foothold that would counter the rising tide of anti-communism in the country.

In terms of the CPUSA's sense of attachment to the political system as citizens, the decision to forsake the institutional strength of the CIO in favor of the possibility of gaining a foothold in electoral politics is an interesting development. Anti-Communist measures were being adopted across the country, with large majorities in both major parties actively supporting these measures. Rather than pushing Communism out of the electoral process, however, these measures actually served to increase their association with it through the formation of their own national election-based party. New regulations akin to the Taft-Harley Act were

¹³¹ Ibid, 170

destroying the institutional power the CPUSA had depended on, and therefore they took it on themselves to challenge these policies head on by assembling a broad based coalition of active voters that could give the CPUSA direct influence over legislative affairs. Instead of working through either of the two parties, the CPUSA could directly design their own legislative agenda without fear of alienating more moderate political forces.¹³² At the same time, this decision was not made until it seemed clear that they would be squeezed out from the ranks of the CIO, and subsequently the Democratic Party. This seems to indicate that although the CPUSA believed their Party could seize on certain political opportunities for a third party candidate with a popular front runner like Wallace, in reality their push for the Progressive Party was more based on a sense of growing isolation from the existing political system. In this way, the decision to back the Progressive Party was a sort of acknowledgement by the CPUSA that unless they directly entered the world of electoral politics and thereby gain direct access to the functions of government, they would lose any real political influence. This plan, though fairly reasonable, had one flaw: Wallace was never entirely comfortable with the CPUSA's role in the Progressive Party.

Henry Wallace, former vice-president under President Roosevelt, was a rising star in the American left. After he resigned as Secretary of the Treasury in 1946 in protest of the Marshall Plan and the U.S.'s broader antagonism with the Soviet Union, Wallace began a series of speaking campaigns emphasizing the need for U.S.-Soviet partnership, particularly a widely popular tour through Europe

¹³² Ibid 178

where he was happily greeted by millions of foreign supporters.¹³³ Domestically, he was a strong supporter civil rights, refusing to speak at segregated events 10 years before *Brown v. Board* turned segregation into a political litmus test. Despite this, he was far from a fellow traveler. His critique of the Marshall Plan was less a Foster-esque assault on U.S. Imperialism than a Browderist fear that such a policy would damage the possibilities of a U.S.-Soviet alliance. More importantly, however, Wallace was never entirely comfortable with the public support the Communists were giving his candidacy, hoping instead to have the discrete relationship that marked the party's relationship to FDR. The Communists, however, were looking at the Progressive Party as their chance to publicly address the anti-Communist, anti-Soviet policies and attitudes of the day. This dissonance created a division between Wallace's inner circle and the CPUSA members who worked within the Progressive Party that undermined the efforts of the Party to fully utilize the networks each of these groups had to offer.

Furthermore, developments abroad exacerbated the divide between the Soviet Union and the U.S. to a degree that made the calls for peace and cooperation from the Progressive Party increasingly out of sync with the political mainstream. In particular, the ouster of Marshall Tito's Yugoslavia from the Communist bloc for defying Soviet ideology and cooperating with non-Communists, combined with the Czechoslovakian Communist Party's removal of their long standing non-Communist coalition partners, gave the impression that the Soviet Union was increasingly seeking to create the same type of ideological and political separation between

¹³³ Ibid, 120

Communism and Western Powers as President Truman.¹³⁴ Despite this, the Progressive Party, a coalition largely based on a rejection of the U.S.'s "tough talk" policy towards Communism, rejected the Vermont Resolution, which submitted an amendment to the Party Platform saying that "although we are critical of the present foreign policy of the United States, it is not our intention to give blanket endorsement to the foreign policy of any nation"¹³⁵ The amendment was designed as a way to clarify the Party's willingness to critique Soviet Union policies just as they critiqued the U.S.'s. To delegates at the convention, however, it represented the type of red-baiting that their campaign was designed to combat. The resolution was defeated, and the national press and politicians alike quickly branded the Progressive Party and the CPUSA organizations dedicated to the growth of the Soviet Union rather than real cooperation between the two Superpowers.¹³⁶ This development not only doomed the Progressive Party's electoral ambitions, but further strengthened the widely held notion that Communists as a whole were more Soviet than American.

The Progressive Party, far from integrating Communism into the political arena and demonstrating its broad support across the American population, failed to garner even a million votes in the 1948 election, falling far short of the 10 million many expected Wallace to earn in early 1947. However, despite the fact that the CPUSA was no longer protected by their connections to Labor and without an independent source of strength in either the legislature or the voting populace as a

¹³⁴ Ibid 191

¹³⁵ McDougall, Curtis Daniel, *Gideon's Army*, Vol II, 571

¹³⁶ Lemelin, Bernard, "The U.S. Presidential Election of 1948: The Causes of Truman's 'Astonishing' Victory", 47

whole, they were still determined to maintain their role as the American vanguard for the proletariat revolution. With their membership still intact, they saw the Progressive Party's failure as more of a setback than a failed last stand. What they didn't realize, however, was that soon the anti-Communist forces in Washington would crush what little structure and support they had left.

Dennis v. United States: A Tighter Marketplace

The Supreme Court and the American Zeitgeist

Senator Joseph McCarthy has become the cultural symbol for the Red Scare, and for good reason. He was a central figure in anti-Communist politics of the era, helping to expand the paranoia to an unprecedented degree and set a new standard for political opportunism by combining alarming rhetoric with righteous indignation. With that being said, he was only part of the story. There were countless idealistic and opportunistic anti-communists that fueled the fires of paranoia. In a way, though, this was merely the extension of a long held pattern in American politics of what has been termed “pathological repression”,¹³⁷ which argues that America is predisposed to these forms of fervent repression in times of national paranoia concerning public security and national integrity. From this perspective, what is of greater importance is the Supreme Court’s willingness to uphold the various forms of censorship that this fear created.

At the close of World War II, as previously explained, it seemed that the Marketplace of Ideas established within the confines of the clear and present danger test put forth by Justice Brandeis and Justice Holmes had become the accepted approach towards First Amendment Jurisprudence concerning political speech. With a developing strain of libertarian justices, the Supreme Court was increasingly expanding the boundaries of civil rights protection in areas like religious

¹³⁷ Blasi, Vincent, *The Pathological Perspective and the First Amendment*

expression¹³⁸ and civil rights ¹³⁹. The pathologized repression of the 1920's red scare seemed impossible in the face of these increased protections. What these notions failed to account for, however, was that the Supreme Court was in the same Cold War environment as their elected counter-parts.

At the heart of this argument is the fact that the Supreme Court, far from an elevated institution removed from the realm of U.S. politics, is an ever-changing institution that reflects its times.¹⁴⁰ This is not to suggest that the justices have been historically unable to analyze cases from a constitutional rather than political perspective, but rather that their decisions have been in some capacity based on the political situation in which they find themselves in. Nowhere is this clearer than in their handling of government censorship of domestic Communism. In an atmosphere when there was a very real sense of impending Soviet Invasion in the eyes of the public and many of the most influential and intellectually capable policy leaders, the newly minted Vinson Court by and large permitted the censorship of internal communism as a necessary part of the ongoing fight against the Soviet Union. The pro-censorship decisions of the Supreme Court, far from a rejection of the "clear and present" danger test, were based on a different interpretation of what constituted such a danger to the security of the United States. In their eyes, advocacy of a sort of Communism Revolution was just as dangerous as direct incitement of

¹³⁸ *United States v. Ballard*, which prohibited the state from determining the validity of religious ideas in defining what is a functional religious faith for legal purposes, 1944

¹³⁹ *Missouri ex rel. Faines v. Canada*, which ruled a Missouri prohibition on admission of African Americans into state law schools unconstitutional, 1938

¹⁴⁰ Casillas, Christopher, Enns, Peter, Wohlfarth, Patrick, *How Public Opinion Constrains the Supreme Court*

such a revolution because the political circumstances at home and abroad made Communist revolution a real possibility if it was given time and space to develop.

Although the Supreme Court dealt with a number of anti-communist statutes, no law is more closely connected with this moment in American civil rights history than the Smith Act. Passed in 1940 as a way to control domestic groups sympathetic with Nazi Germany, the law stated “whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States....by force or violence....shall be fined under this title or imprisoned not more than twenty years.” Almost a verbatim reproduction of the Sedition Act of 1918, the bill became one of the cornerstones of the anti-Communist efforts. Although HUAC hearings on subversion and espionage dominated the newsreels, with figures like Alger Hiss and the Rosenbergs stoking fears of Soviet incursion into every aspect of American life, it was the Smith Act that created the legal framework for the suppression of Communism as an ideology. The fact that it was originally designed to aid American war efforts is notable; as it demonstrates the way these anti-Communist efforts were situated within a framework based on national loyalty and national security. Therefore, by virtue of using the Smith Act as a means of Communist censorship, the Government was affirming their identity as foreign aligned enemy sympathizers. The Smith Act, therefore, forged the link between the geopolitical fears of Soviet militarism with the widespread ideological rejection of Communism. Without it, domestic Communism, although generally looked down upon, was yet another source of dissenting views.

Despite the fact that the Smith Act is now synonymous with anti-communism, it was not until almost 8 years after its ratification that it started to be used against the CPUSA. As President Truman and the Democrats sought to fend off Republican attacks on their anti-communist credentials, while simultaneously combatting Henry Wallace's attacks on the growing "red-baiting" phenomenon, the Attorney General's office quietly began to develop a Smith Act case against the CPUSA.¹⁴¹ When the case finally developed, the FBI and Department of Justice raided the New York headquarters of the CPUSA on July 20th, 1948, arresting William Z. Foster, Eugene Dennis, along with 3 other members of the Party's National Committee. In the next month, another six party leaders would turn themselves in. The news of the arrests was met with praise from the conservative leaning *The Chicago Tribune* to liberal minded *The New York Times*, and it seemed to be a matter of time before the guilty verdict was returned. The CPUSA understood this and actively worked to prevent the trial by condemning the trial as an assault on democracy and pressure allied groups, such as labor unions and other leftist political organizations, to do the same.¹⁴² Despite these protests, and continual legal maneuvering by Party lawyers in an attempt to push back and possibly prevent a trial, the 11 members of the CPUSA national committee began their hearing on January 17th, 1949 in the U.S. Court of Appeals for the Second Circuit in lower Manhattan, and with that *Dennis v. United States* was underway.

¹⁴¹ Belknap, 51-52

¹⁴² Ibid, 61

A New Court and a New Approach

In order to understand the jurisprudential changes in the scope of the clear and present danger test, it is essential to realize that the Supreme Court of the Red Scare had a radically different approach to civil liberties from the court's that came before it. Buttressed by the growth of a judicially conservative bloc consisting of three Truman appointees, Justices Clark, Burton, and Minton, along with the FDR appointed Justice Reed, the appointment of Chief Justice Fred Vinson by President Truman in 1946 created a court that emphasized deference to the legislative and executive branch in determining issues of national security.¹⁴³ This deferential stature led them to determine that the dangers created by the Cold War demanded that state authority were paramount over individual liberties.¹⁴⁴ In this capacity, the Court seemed to be returning to the security-minded decisions of the 1910's and 20's that accepted the clear and present danger but largely interpreted advocacy of "dangerous" ideologies to constitute such a danger. Once again, domestic Communism's connection to the Soviet Union led to a growing sense of fear that advocacy of Communism, rather than only incitement, represented a clear threat to American security. The main difference was that whereas the 1920's Red Scare was based on a fear of a still burgeoning Soviet Union, the Red Scare of the 1950's was based on a fear of a Soviet Union that rivaled the U.S. for global hegemony.

The first manifestation of this change in judicial perspective was the Court's decision in *American Communications (CIO) v. Douds*. The case concerned the Taft-

¹⁴³ Sabin, 147

¹⁴⁴ Melvin I. Urofsky *The Supreme Court Justices: A Bibliographical Dictionary*, 492

Harley Act's requirement that Union's affidavit's affirming that there were no Communists in their ranks. While labor lawyers argued that the statute represented an undue restriction on individual's speech by connecting their jobs to their political ideologies, the court ruled that it was constitutional for certain occupations to discriminate on the basis of ideology if that ideology could have a negative impact on the performance of the job itself. In this case, the threat of political strikes organized by Communists in order to cripple U.S. industry.¹⁴⁵ As the majority stated, this decision was not about a desire to censor certain ideas out of a fear of their consequences, but instead based on the need to protect "the free flow of commerce from what Congress considers to be substantial evils." This decision demonstrated a shift in the interpretation of the clear and present danger test by diminishing the importance of demonstrating active incitement that Justice Brandeis articulated in his *Gitlow* dissent. The mere possibility of politicized strikes, rather than the act of planning of them, was enough of a danger for the Court to affirm the laws constitutionality.

While Chief Justice Vinson's decision highlighted the long-standing importance of the clear and present danger test, he made sure to explain that the test is not an absolute, universal law. As he explained, "the right of the public to be protected from evils of conduct, even though First Amendment rights of persons or groups are thereby in some manner infringed, has received frequent and consistent recognition by this court." Citing cases ranging from barring unscheduled religious

¹⁴⁵ In order to demonstrate the possibilities of such strikes happening, they cited a 1941 strike in a Milwaukee military plant organized by the Communist party as a way in which these strikes could cripple key segments of the U.S. economy

or political parades that impede traffic¹⁴⁶ to censorship to affirm communal standards of morality¹⁴⁷, Vinson places an emphasis on elevating communal standards over certain individual rights. In doing so, Vinson's subtle shift away from the clear and present danger test in some ways represents a much more consequential return to the deferential, "public good" conception of restrictions on individual speech that defined pre-*Schenck* Free Speech doctrine. The key difference, however, was the fact that in this case the Communists were not only voicing opinions, but also actively attempting to initiate actions that would have consequences on the American economy for political purposes. This raises an important question: how exactly did the Court view the CPUSA?

The general opinion of the Court, and of congress, concerning the nature of the CPUSA compared to other political groups was summed up quite nicely by Justice Jackson's concurrence for the case. As he explains, "Congress could rationally conclude that, behind its political party façade, the Communist Party is a conspiratorial and revolutionary junta, organized to reach ends and to use methods which are incompatible with our constitutional system." Just as importantly was Congress' finding, which Justice Jackson agreed with, "is dominated and controlled by a foreign government....which, to the threat of civil disorder, adds the threat of betrayal into alien hands." The implication is clear: the CPUSA, unlike other political parties, is directly aimed at dismantling the United States government in order to advance the interests of the Soviet Union. While the Court explicitly rejects the idea of categorically outlawing Communism, they do make a point of explaining that the

¹⁴⁶ *Cox v. New Hampshire*, 1941

¹⁴⁷ *Reynolds v. United States*, 1878

CPUSA's ideological underpinnings and foreign connections make them a danger when given access to certain forms of economic or political influence. This rested on the idea that, as Justice Vinson explained, "that beliefs are springs to action," a notion that in many ways rejects the distinction between advocacy and incitement that had become a defining part of the clear and present danger test up to the point. With this in mind, it was entirely warranted that such beliefs could reasonably be assumed to create a direct danger for the American community. In this way, the Court situated their decision within the clear and present danger test was in part by denying the legitimate citizenship of CPUSA members.

This decision also demonstrates the differing interpretations of the Marketplace of Ideas that were inherent in these decisions. As Justice Vinson explained in his decision, "speech may be fought with speech. Falsehoods and fallacies must be exposed, not suppressed....that is the command of the First Amendment." The problem, however, was the possibility that allowing Communists to be a part of government-sanctioned organizations could put them in a position to initiate illegal, subversive actions. In this way, the marketplace was closed off to these individuals because their ideologies seem to suggest that they would use their positions in a way that would ultimately be dangerous to the overall structure of the state. In this way, the majority did not even see their actions as a censorship on speech: to them, the loyalty oaths were a way of preventing certain forms of action. In this way, the Marketplace of Ideas was a construct that needed to be protected from ideological radicals that could cause illegal actions ultimately damaging to that Marketplace

Justice Black's dissent, on the other hand, argues that the precedent established by the Court's decision directly undermined the American system of free political discourse. By permitting the denial of access to the Marketplace of Ideas to certain groups because their ideologies supposedly predisposed them to commit illegal acts, the decision, as he argues, justifies the ability of the State to censor Democrats if Republicans testify they are a threat to national security and vice versa, thereby de-stabilizing the entire system of political exchange. In essence, by blurring the line between advocacy and action, the Court has created a system where individuals can be censored for whatever imagined crimes their opponents accuse them of being prone to. Furthermore, Justice Black argues that this decision would have a destructive impact on the viability of future minor parties, as they could now be censored for political reasons by deeming their ideologies actively dangerous to American security and stability. To Justice Jackson, by de-emphasizing the distinction between advocacy and incitement in determining what violates the clear and present danger test, the Court restricted the openness of the political system to ideological minorities. This push for a more open marketplace regulated by a more stringent interpretation of the clear and present danger test, however, was out of touch with the rest of the Court.

Dennis v. United States

The trial, whose outcome was rarely in doubt from the start by either side, was more theatrical than legal. The CPUSA believed that the only hope of avoiding

imprisonment was through the intervention of mass protests.¹⁴⁸ Therefore, their defense was based more on stalling tactics than actively refuting the veracity of the arrests. When this tactic proved inadequate, they instead turned to using the trial as a platform for expressing the Party's general ideology, a long-standing practice within the party known as a "labor defense".¹⁴⁹ Rather than directly address the claims made by prosecution, this strategy centered on critiquing the entire American legal system according to Communist principles, often in the form of critiquing the economic class make up of the jury and elected representatives as a demonstration of the lack of working class control over the mechanisms of power. The prosecution, on the other hand, focused their efforts on demonstrating that the CPUSA, under the conspiracy provisions of the Smith Act, was as an illegal organization working towards the violent overthrow of the government. This argument was based on the idea that the Communist Party, reorganized in 1945 after its brief stint as the more moderate Communist Political Association, constituted an organized effort to shift the party's focus towards advocating and teaching the desirability of violent revolution in the United States. In order to prove these claims, the State attorney's focused much of their case on the literature the Party prescribed, such as Marx and Engels *The Communist Manifesto* and Lenin's *State and Revolution*. This was designed to demonstrate that the Communist ideology the party adhered to demanded violent revolution of its members.

The fact that much of the case centered on discussions of abstract Communist ideology, rather than the specific workings of the CPUSA, demonstrates the fact that

¹⁴⁸ Sabin, 69

¹⁴⁹ Ibid, 92

the case was in reality a trial of ideologies. This was not about what the CPUSA did or did not do: this was about who the CPUSA was. As such, it was no surprise to either side when the jury issued a guilty verdict on all counts. In response, the “Dennis Eleven”, as the defendants came to be known, immediately began to work on their appeals. Although they had little doubt these appeals would not overturn the guilty verdict, they went through in the hopes that the mass protests that failed to materialize in New York would come to their rescue in Washington.

In their appeal to the higher courts, however, the CPUSA moved away from their initial defense strategy based on a reiteration of Marxist-Leninist principles and instead sought to situate their trial squarely in the realm of American constitutionalism. In accordance with the Party’s growing emphasis on America’s march towards fascism, the Eleven asserted that the Smith Act was an assault on political speech, and therefore represented a clear attack on America’s legacy of free speech. While this argument ignored America’s history of speech repression, one the Communists were all too familiar with, it does demonstrate something of great importance: the CPUSA, despite the fact that they had become enemies of the state in the eyes of the state, still maintained a sense of connection to American government. They felt that the American Constitution entailed certain guarantees of political rights, but these rights had been ignored by what they viewed as fascist politicians. Unfortunately for them, however, the existential fears brought about by the Cold War fundamentally changed the way the Supreme Court viewed Communism’s place in the world, and these changes were reflected in judicial

integration of the Soviet Union's global expansion into their interpretation of the Smith Act.

The significance of the changing signals sent by the Supreme Court concerning the importance of direct incitement in proving a violation of the clear and present danger test were clearly seen in the Second Circuit Court of Appeals decision in *Dennis* upholding the prosecution of the CPUSA national committee. The decision was all the more demonstrative of the changes in U.S. Jurisprudence due to the fact that it was written by Justice Learned Hand, the author of the *Masses* decision in 1917 that helped initiate Justice Holmes development of the Clear and Present danger test two years later in *Schenck*. Despite his longstanding history of support for the protection of individual liberties, Justice Hand felt that between the rising tide of Communist efforts around the globe ¹⁵⁰ and the signals of support for anti-communist measures from the Supreme Court,¹⁵¹ the requirements for a balancing of national security and individual liberties demanded that the prosecution be upheld. Of particular note is his use of "judicial notice" as a way of affirming the fact of the global threat of Communism.¹⁵² This legal tool establishes the relevancy of certain political conditions to the case at hand, in this case the worldwide conflict between the Soviets and the Americans. In doing so, Justice Hand re-affirmed the Court's placement of the debate over CPUSA leader's Free Speech rights within the broader military-political conflict with the Soviet Union.

¹⁵⁰ As he explained, "any border fray, any diplomatic incident...might prove a spark in the tinder box, and lead to war" Gunther, Gerald, *Learned Hand: The Man and the Judge*, 609

¹⁵¹ Ibid, 610

¹⁵² Sabin, 80

When the case finally reached the Supreme Court, this concept of judicial notice was a cornerstone of the Court's decision to uphold the state's conviction. By focusing on the unique challenges facing the U.S. as a result of the Cold War, Chief Justice Vinson sought to distinguish the case at hand from the landmark cases in which Justice Brandeis and Justice Holmes developed the clear and present danger test by explaining that "they were not confronted with any situation comparable to the instant one – the development of an apparatus designed and dedicated to the overthrow of the Government" As such, the Court had to balance the protections the Court had developed with the increasingly alarming security needs the country faced. In light of the active expansion of Communism, from Czechoslovakia to China to Korea, the Court felt that the clear and present danger test did not require the court "to wait until the putsch is about to be executed, the plans have been laid and the signal is awaited. If government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when leaders feel the circumstances permit, action by the Government is required." This represented a clear break from the 1930's and 40's court's understanding of the clear and present danger test because it equated advocacy with incitement. As Vinson argued, there was no substantial difference between the two in the case of the CPUSA because advocacy naturally depended on the party's willingness to take part in a non-democratic revolution in the name of Communism. With this link established, it was only logical for the State to put down these sentiments before they were able to grow to a strong enough degree that they could put their intents to work.

That is not to suggest that the court simply paid lip service to the existing doctrine while creating an entirely new one. From the very outset of the decision, Chief Justice Vinson immediately accepts that *Schenck* and the subsequent decisions in the 1920's formed the backbone of modern Free Speech jurisprudence. With this in mind, the Chief Justice expands upon his decision in *Douglas* that the Court's new approach to censorship, far from going against these existing frameworks, was the only possible means of giving them the necessary flexibility to adapt to social and political changes. Nowhere is this connection clearer than in the Chief Justice's use of the Marketplace of Ideas construct as a guiding principle behind the decision. As he explains, "the basis of the First Amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies". The problem, however, was that Communism, as a foreign born organization advocating undemocratic means of change, threatened the national security that was necessary for the continued existence of any coherent Marketplace of Ideas.

Of particular importance to this connection is the close association the Court established between the CPUSA and the Soviet-aligned Communist community. In order to do so, the Court actively, and correctly, connects the dissolution of the CPA and the reformation of the CPUSA with changes in "the policies of the association...from peaceful cooperation with the United States and its economic and political structure to a policy which had existed before the United States and the Soviet Union were fighting, namely, a policy which worked for the overthrow of the Government by force and violence" In citing the link between the changes in the

Party's structure to the changes in the Soviet's policy towards the United States, the Court touched upon the key question of the case: if a domestic organization actively connects itself to a foreign entity that is an avowed enemy of the United States, is it justifiable for the government to remove that group from the process through ideological censorship? The Court's answer: yes. The CPUSA's guilt was not solely based on the fact that they were promoting undemocratic means of change, but rather that they were promoting these means of change in accordance with a foreign power that the U.S. was actively in conflict with. This is built on an understanding that, as Justice Jackson said in his concurrence in *Douds*, "in each country that the Communists have seized control, they have so denationalized the foreign policy as to make it a satellite and vassal of the Soviet Union and enforce a domestic policy in complete conformity with the Soviet Pattern." From this perspective, it is clear why the revolutions around the world justified the illegalization of the CPUSA despite the fact that the power and influence American Communists paled in comparison to their peers in Korea, China, Czechoslovakia, and other countries affected by Communists Revolutions: The CPUSA, although relatively small, was still a part of this undemocratic, anti-American network, and as such they were a foreign threat that endangered American Democracy. This demonstrates the fact that, while the embrace of advocacy as clear and present danger is an important part of the Vinson Court's reinterpretation of Free Speech doctrine, this shift was based on a larger embrace of certain ideological boundaries for the Marketplace of Ideas based on who was a citizen and who was not.

Political Impact of *Dennis*

Not only was the decision in *Dennis* met with a predictable degree of public fanfare, but more importantly, Chief Justice Vinson's expansion of what constituted a clear and Present danger on the grounds that Communism represented a clear threat due to the ongoing Cold War was warmly embraced by the public at large. As the *Los Angeles Times* reported, "A time may come again when a Communist will be a harmless member of a political splinter party... But that time is not now or in the foreseeable future. We are fighting Communists with blood and money on both sides of the world; now the Supreme Court permits us to fight it at home"¹⁵³. With the Korean War raging overseas, the American public seemed ready to embrace the restrictions on civil liberties as a necessary cost of war. This belief that the *Dennis* decision was part of the ongoing fight against Communism abroad and at home was echoed around the country. For the Department of Justice, it was a green light that gave them the legal go-ahead to arrest dozens of supposed Communist leaders around the country.¹⁵⁴ These events immediately became public affairs, as Newspapers began publishing "box scores" for how many Communists had been arrested in the previous days or weeks. In the ensuing years, with politicians like Senator McCarthy continually attacking the Truman and then Eisenhower administration on perceived weaknesses in dealing with domestic communism, arrests under the Smith Act became the easy and definitive way to demonstrate to constituents and political opponents one's anti-communist credentials. One law

¹⁵³ "A Clear and Present Danger," *Los Angeles Times*, June 6th, 1951

¹⁵⁴ Belknap, 152

relating to the Smith Act, in particular, demonstrates the new degree of acceptance for anti-communist measures that would have been unthinkable before *Dennis*. Known as the Expatriation Act and passed in 1954, it mandated that any individual prosecuted under the Smith Act would immediately lose their citizenship. Similar bills were proposed by then Congressman Nixon in 1946 and 1947 calling for the deportation of all accused communists, but it was rebuffed as extreme and unnecessary.¹⁵⁵ With a Republican in the White House and the public squarely behind the effort, however, now it seemed like the logical next step in the American war on communism. By stripping all convicted communists of their citizenship, the law made official what *Dennis* and years of Red Scare rhetoric had been trying to demonstrate: no true American could ever be a communist, and any communist was no true American.

By and large, the trials were largely decided before they ever came in: of the 126 individuals arrested for violating the Smith Act, only 10 were acquitted. As the Supreme Court had essentially ruled that supporting Communism in and of itself represented a threat to the State, evidence could be replicated from case to case. All that was needed was to first prove the individual was in the CPUSA and then read a few passages from Marx or Lenin and the case would be closed. For local politicians, it was a chance to extend the reach of the Red Scare to a variety of public fields. One such example was the New York School Systems decision to require loyalty oaths for all teachers. This decision was directly linked to *Dennis*, as the Superintendent of the New York schools explained in the wake of the decision that “The nation’s highest

¹⁵⁵ Starobin, 66

court has held that the Communist Party is a criminal conspiracy against the United States of America. That is what we contended in the trial of the eight teachers. "¹⁵⁶ By ruling against the CPUSA, the Court had done much more than uphold the constitutionality: it had affirmed in the minds of Americans big and small that the CPUSA, and Communism as a whole, was a dangerous conspiracy that had no place in American politics or American life.

One of the often-overlooked effects of the *Dennis* trial was the effect the Court's decision had on the willingness of liberal-minded lawyers to defend Communists from future Smith Act trials. The key to this was the fact that in the initial trial, Justice Medina, who was openly hostile to the CPUSA defendants, eventually held the CPUSA's entire legal team in contempt of court for pleading the fifth instead of testifying and, in the eyes of Judge Medina, making a mockery of the court with their propagandistic efforts. But this alone would have only been demonstrative of the Judge's bias, if it weren't for the fact that he immediately sentenced the lawyers without a trial. These acts, which directly undermined the judge-lawyer relationship that is essential to effective courtroom proceedings, were upheld by the Vinson court in the *Dennis* decision as a justifiable response to the defendant's "provocative" actions in the court, such as frequent objections and theoretical-grounded defenses. In doing so, the *Dennis* decision legally condoned the trend of persecuting the lawyers who defended communists along with their clients. Organizations such as the National Lawyers Guild, the Civil Rights Congress, and the Bail fund, all of which provided funding to legal defenses for Communists tried

¹⁵⁶ Sabin, 91

under the Smith Act, were all placed on the Subversive Organizations List and quickly cut off from state and private funding. Furthermore, the American Bar Association recommended that all Communists and advocates of Marxist-Leninism be expelled from the practice of law, demonstrating the extent to which the legal community embraced these Cold War era restrictions.¹⁵⁷ Without access to legal defense, Communists, already fighting an uphill battle, were left with almost no legitimate chance to fight off accusations once made.

Public Opinion and Communism

While these examples clearly demonstrate the legal and political ramifications of the *Dennis* trial and the associated Red Scare policies, they only provide part of the picture. One key aspect that has only been indirectly alluded to is the effect these decisions, and the Red Scare as a whole, had on public opinion. While clearly connected to the policies and rhetoric that is supported in Washington, these only provide indirect clues. Luckily, this same thought occurred to sociologist Samuel A. Stouffer, a pioneer in sociological survey techniques who in 1954 surveyed over 6,000 American citizens concerning their attitudes towards Communism and conformity as a whole. In doing so, he provides an in-depth picture of the individual and social atmosphere of the Red Scare

One trend that Stouffer's data confirms is the uptick in anti-communist sentiments in the wake of the Cold War: between 1945 and 1953, the percentage of college-educated peoples who would deny Communists the right to Free Speech increased from 31% to 71%, while the percentage amongst non-college educated

¹⁵⁷ Ibid, 132-133

people increased from 42% to 78%. Furthermore, at the time of this study, 80% of respondents stated that an admitted Communist should lose his or her citizenship, while 52% said they should be put in jail. Along with this, Stouffer also focuses on the changes in people's general opinions on dissent. In doing so, Stouffer measures not only the change in anti-communist sentiment in the cold war, but also the larger changes in the perception of non-conformity as a whole. This is of particular importance because it demonstrates a change in the notions of what constitutes legitimate democratic action, and by extension what constitutes a legitimate democratic citizen. As is made clear by his data, the perception of dissent in the U.S. had drastically worsened between World War II to 1953. This can be seen in a number of different survey results, such as the fact that the percent of people who supported the right of the government to deny Socialists the right to publish increased from 25% to 45%. While this is the largest such jump in this category, it is far from the only one. When the question is broadened to encompass all newspapers' not just Socialist sources, right to criticize our form of government, the percent supporting a government ban grew from 30% to 42%. At the root of this question is a concept of how limited, or unlimited, free speech is, and Stouffer goes on to show that whereas 32% of respondents opposed unlimited speech before World War II, 42% opposed it by 1953.

These findings raise an important question: why has the perception of dissent worsened so significantly in this 13-year period? One possible answer that Stouffer provides is that dissent is perceived to be particularly dangerous because it can rapidly spread. The clearest illustration of this is that when asked what people

fear in Communists, a full 28% stated that they were most concerned with the spreading of Communist ideas into the general population. While sabotage and Espionage were represented, with 8% for each, this fear of conversion had a clear plurality amongst those respondents. This fear took many forms, but mostly it was articulated through the respondents' sense that Communists were agitating political and ethnic minorities, like industrial workers and African Americans, while simultaneously infiltrating the school system and developing communist sentiments in their children. At first this may seem confusing: how can the threat of ideas be more wide-spread than the threat of direct action, especially at a time when the Rosenberg's' espionage trial had made the threat of Soviet spies a frightening reality to millions of Americans? The answer lies in the fact that the American Red Scare was not a war on a dangerous organization trying to actively subvert the American government, but an attack on an ideology that critiqued the entire American way of life. While espionage was a serious concern for Americans, one that Soviet reports released following the Cold War demonstrate was in many ways legitimate,¹⁵⁸ the true target of the Cold War was Communist ideology, not Communist action.

In demonstrating the tendency towards an ideological rather than security-based explanation for anti-communism, this data also demonstrates that the Red Scare created an atmosphere that completely rejected Communism in every facet of American life. One series of questions that Stouffer employs that demonstrate this is concerning whether or not individuals believe avowed Communists should be fired from certain jobs. Stouffer separates these questions into two types of jobs:

¹⁵⁸ Haynes, *Venona: Decoding Soviet Espionage in America*

sensitive and non-sensitive jobs. Sensitive jobs, like working in a defense plant and teaching in a high school or college, relate directly to fears of Communist sabotage and cultural infiltration. Non-sensitive jobs on the other hand, like radio singers or store clerks, are not connected, at least explicitly, to such concerns. As can be expected, there is a marked difference between the number of respondents who think an admitted Communist should be fired from a sensitive job versus a non-sensitive job, with over 90% supporting firing individuals from defense plants or teaching positions. Despite this increased support for firing Communists in sensitive jobs, the degree to which individuals believed communists should be fired from non-sensitive jobs still formed an overwhelming majority, with 68% saying Communist store clerks should be fired while 64% said that Communist radio singers should be fired. While this increased degree of disapproval for Communists having sensitive jobs rather than non-sensitive jobs indicates a degree of acceptance of Communism if it wasn't in a field related to certain national interests like security or education, the fact that over a majority of the respondents held that Communism should not be hired to positions where Communism would likely have little or no impact on the job performed demonstrates a desire to expunge Communism as a whole from American Society. The problem, therefore, is not simply that Communists may sabotage our military might and national security, but that Communism may become a part of the American community. From this perspective, even if a relatively large Communist minority, or even a strong majority, were eventually formed in America, Communism would still be unacceptable because it is fundamentally against basic American values.

The Fall of the CPUSA

The Party Contracts

With these increasing hostilities swarming, and government persecution reaching new heights each year, the CPUSA began to show the first signs of collapse shortly following the initial arrest of the Dennis Eleven. A key part of this organizational downfall was the CPUSA leadership's decision to close ranks and promote a more disciplined membership. This emphasis manifested itself into persecution based on either inadequate ideological purity or party loyalty.¹⁵⁹ While these two were often connected, with individuals lacking Marxist-Leninist credentials quickly seen as party dissidents, they were really reactions to two different developments. The focus on loyalty was in large part a response to the fears of government-sponsored espionage into the ranks of the CPUSA, a well-documented FBI practice that was so widespread that J. Edgar Hoover once stated that there were more FBI agents in the CPUSA than communists.¹⁶⁰ The most noticeable example of this was the removal of Anna Louise from the ranks of the party. Once a noted intellectual figure with connections to a variety of influential Washington offices, in 1949 Soviet officials declared her an American spy and, without a word of protest from the CPUSA, she was immediately cut off from all Communist Party activities. These purges often actively supported the anti-communist efforts they were meant to defeat, as demonstrated by the case of John Lautner, a long-time ranking member of the New York Communist party who had

¹⁵⁹ Starobin, 198

¹⁶⁰ Gentry, Kurt, *J. Edgar Hoover, The Man and the Secrets*, 442

served in the O.S.S. during World War II.¹⁶¹ As accusations of treachery emerged from Soviet sources, he was quickly removed from the party. In response, he began to become one of the most frequently used witnesses in Smith Act trials around the country. By looking to strengthen the party by removing government informants, the CPUSA had inadvertently made one.

This emphasis on party discipline, however, was a lesser priority to the goal of establishing an ideologically pure membership. As Eugene Dennis said shortly before he was sent to jail in 1951, “we must safeguard the purity of Marxist Leninism. We must wage war against all deviations, be they right or left opportunism, whether they are manifested in our trade union work, in our election campaigns, in the fight for Negro rights, in national group work, or in any other field of our mass activities”¹⁶² Rather than looking to increase their influence through an expansion of their ideological boundaries as they did with the Popular Front in 1935, the CPUSA now sought to close ranks and maintain ideology unity at all costs. It was this drive for ideological purity that the crusade against “white chauvinism” into a central part of the party’s platform. Based on an attempt to expand their influence within the African American community, the party began to purge themselves of any vestiges of white privilege, from the activities they took part in to the language they employed. Trials against individuals who used terms like “whitewash” and “black sheep” became commonplace, and soon party officials were called before tribunals to apologize for racist language used in cultural texts from

¹⁶¹ Starobin, 218

¹⁶² Dennis, Eugene, “Let Us March Forward”, Cited from Fried 370

decades before.¹⁶³ This isn't meant to suggest that an attempt to do away with "white chauvinism" in language and culture isn't important: indeed, this movement helped spur the creation of militant, black nationalist movements that formed and continue to form an important core of the Civil Rights movement. Considering the hostile political atmosphere the party was in, however, their focus on a crusade against linguistic racism is one example of the party's emphasis on ideological unity rather than political expediency.

This ideological unity, however, was not only based on a desire for the CPUSA to create a lean, mean proletariat machine in the face of increasing American attacks: it was also a part of a global movement within the Communist party to prevent the formation of another Marshall Tito. Tito, the leader of the Yugoslavian Communist Party, openly broke with Stalin and the International Communist Community in 1949 in order to pursue a more Yugoslavia-specific policy platform. This was the first major defection within the Soviet Communist International and it shook the confidence of the movement's unity that was fundamental to its global aspirations. It was this unity that the Party was seeking to maintain through its emphasis on ideological and political unity, and in doing so the CPUSA continued to alienate itself from its American audience through the adherence to foreign dictates. In doing so, the Party began to increasingly embrace the foreign identity that had been imposed on it for decades.

¹⁶³ Starobin, 199

The CPUSA and the Soviet Union

While this adherence to Soviet demands was nothing new, especially in the wake of the anti-Browderist crusade that sought to remove any attempts to create a more “Americanized” political association, it took on new dimensions as the Red Scare deepened. By refusing to distinguish themselves in any capacity from the Communist Parties abroad, in particular those taking part in active military action against various Democratic and un-democratic governments in Asia and Eastern Europe, the CPUSA made its attempts to proving its non-violent nature all the more challenging when brought before American courts. This shift to a totally Soviet-minded perspective was at the core of the Browderist purge and the refusal to pass the Vermont Resolution at the 1948 Progressive Party National convention: in both cases, instead of taking a more balanced perspective that would be willing to place critique both the United States and the Soviet Union, the party instead chose to wipe away any criticism of the Soviet Union as unwarranted red-baiting. This urge became all the more present as anti-Communism became more prominent in American politics, particularly following 1948, when the Soviet Union made it’s first direct communications with the CPUSA leadership since before the war.¹⁶⁴ In shifting their focus party identity from one based on an American interpretation of the Communist mission, as had been the case during the New Deal and World War II, to the International Communist movement, the party in a way embraced a departure from the American Democratic community.

¹⁶⁴ Sabin, 145

Another manifestation of this insistence on an international, rather than American, party identity was the way in which the party defended itself in the Smith ACT trials. From the very beginning, the focus of the party was not on defending the Party's actions in terms of First Amendment protections, but instead based on the efficacy of Marxist-Leninism. In doing so, they presented a defense based not the efficacy of the American government, but instead one based on an ideology defined by international actors. As John Gates, one of the Dennis Eleven, explained in his reflection on the trial, "it is clear now that instead of becoming involved in doctrinal disputes which nobody could understand, we should have concentrated on the civil liberties aspects of the case: the right to read, write, say and think any political thought we pleased – as set forth as a sacred right in the First Amendment to the United States Constitution".¹⁶⁵ By seeking to defend doctrine instead of American conceptions civil liberties, the Party demonstrated their refusal to embrace an American identity in favor of one based on unity with the International Communist community. The clearest manifestation of this, however, was the fateful decision in 1951 to go underground.

To the Underground

The decision to put much of the Party's organization underground, which in effect affirmed the CPUSA's status as an illegal entity, was precipitated by the Party's fear of an increased degree of government persecution. These fears were first articulated in 1947, when former assistant attorney general and Labor party member O. John Rogge stated that "a dramatic round up of dozens of Communist

¹⁶⁵ Mortimer, Wyndham, *Organize! My Life as a Union Man*

leaders and alleged fellow-travelers” was being planned¹⁶⁶. When the arrests finally came in the form of the *Dennis* trial, there was a widespread sense within the Communist Party that this was only the beginning of what they saw as America’s inevitable road towards fascism.¹⁶⁷ This fear was greatly exacerbated by the ratification of the McCarran Act in 1950, which directly labeled the party as a “foreign agent”.¹⁶⁸ A sense of panic dominated the party as a fear that the *Dennis* arrests were to be replicated on a nation-wide level, all but dismantling the Communist party. Ultimately, on July 4th 1951, when the Supreme Court upheld the *Dennis* arrests on the last day of their session, several of the convicted failed to show up for their arrests. In doing so, they sent a message to the rest of the party that it was finally time to go completely underground, and soon dozens of leading CPUSA officials were sent abroad or into hiding. From there, they would maintain the disciplined vanguard that would wait for the opportunity to realize communism in America. In doing so, the Communists accepted that they no longer had legitimate access to the American political world. It seemed that the American anti-communist efforts had succeeded in pushing the CPUSA out of American politics, pushing them further and further into the hands of the International Communist Community. This complete embrace of Soviet leadership, and the subsequent attempt to create a Soviet identity within the party, ultimately led to the single most devastating moment in the CPUSA’s history: Nikita Krushchev’s denouncement of Stalinism at the 20th Party Congress in 1956.

¹⁶⁶ Gideon’s Army, Vol. 1, 213

¹⁶⁷ 1948 CPUSA Party Platform

¹⁶⁸ Starobin, 219

Kruschev and the Cult of Stalin

The speech was very clear: Stalin was a tyrant, and the “cult of personality” he built around himself was contrary to Marxist-Leninist doctrine. As Kruschev put it “Stalin acted not through persuasion, explanation and patient cooperation with people, but by imposing his concepts and demanding absolute submission to his opinion”.¹⁶⁹ By his own admission, Stalin’s rule was one of absolute tyranny, and the tyranny infected every aspect of the party as loyal members, like Krushcev, stood by and watched. In denouncing Stalin’s rule so harshly, and so absolutely, it completely separated itself from much of the way in which the International Communist Party had been designed. This event, which marked the beginning of the relatively stable détente years, was the death-knell for the CPUSA as it was designed, a complete affirmation of some of the most egregious crimes anti-communist critics had laid against the Soviet Union that they had for decades denounced. Ever since the rise of Stalin in the late 1920’s rumors of his human rights violations and politically motivated purges had become commonplace but, in accordance with Soviet Communism’s emphasis on the dynamic power of individual leaders and absolute loyalty of the rank and file, American Communists flatly rejected these stories as Imperialists propaganda.¹⁷⁰ To these people, Stalin represented the hope for a utopian society, and they had followed his word as scientific law no matter what he did. When the feud between Stalin and Trotsky led to Trotsky’s exile, the CPUSA made a point of removing from their ranks any remaining Trotskyites offering

¹⁶⁹ Kruschev, Nikita, *Cult of the Individual*, first issued in a meeting of the Twentieth Congress of the Soviet Communist Party

¹⁷⁰ Starobin, 225

continued criticism of Stalin's authoritarian rule, a crusade that continued for as long as the Party existed.¹⁷¹ When these accusations ended up being true, the CPUSA members who had carried out these purges felt the most anger, as one member put it, "not with the Russians or Foster or even Stalin, but with myself and others who had been so blind in our adherence to Soviet policy and so mechanical in our application."¹⁷² The CPUSA had put their faith in Stalin's Soviet Union, a faith that ultimately proved misplaced.

The shock was palpable in the American Communist Community, as long time party loyalists had to loom inward and determine whether the cause they had been working towards was worthwhile. At a time when the price for being a Communist, it hardly seemed worth it the CPUSA was in support of a tyrannical government. By completely connecting their identity to the identity of the International Communist Party, instead of forming a more Americanized Political Association as Browder envisioned, the CPUSA put themselves in a position where their policies were, in a very real sense, foreign policies. They had embraced a non-domestic political ideology, and in the end it crippled their response to Cold War realities of persecution on both sides.

¹⁷¹ Mingulin, S. "The Crisis in the United States and the Problem of the Party", 1930

¹⁷² Nelson, Steve, *American Radical*

Signs of Change

1953 and Détente

Krushev's condemnation of Stalinism was part of the Cold War's transition to the détente period. American fears of Communism, as Stouffer's surveys showed, were still there. But at the same time, his studies also show a sign that there were institutional changes in the way the Communist threat was being perceived. In particular, his surveys showed that Community leaders, such as elected officials and the heads of various private political organizations like labor parties and activist groups, were in general more tolerant of Communist activity in their area. Returning to the question of firing Communists from "non-sensitive" positions, in which more than 64% of the general community supported firing Communist clerks or radio singers, only 51% of these Community leaders supported such dismissals. Although still a majority, this is a marked drop-off, one that becomes even more pronounced when it comes to legal restrictions on the rights of Communists. When asked whether or not Communists should be put in jail, only 27% of Community leaders, compared to the 52% from the general community, stated they should. This data suggests that, although the hostilities towards Communism were still relatively wide spread in the general community, it was not as pressing a matter for Community leaders.

What could cause this relative shift? While it is hard to pin point it exactly, many scholars have pointed to Eisenhower's administration as a decisive turning

point in Cold War relations.¹⁷³ He had delivered on his campaign promise to end the war in Korea, and now that Stalin was dead, it appeared that diplomatic relations rather than military brinkmanship could settle the two nations disputes. Although there were still agitations, events like the joint U.S.-Soviet resolution of the Suez Crisis in 1956,¹⁷⁴ which would have been impossible in the Truman-Stalin years, demonstrated a new sense of diplomacy than had been the norm in earlier years. There were still deep and bitter hostilities that laid the groundwork for future conflicts in Vietnam and Afghanistan, but there was also a sense that the war, although still a possibility, wasn't as inevitable as it appeared before.

Earl Warren and a New Court

This change in public attitude was paralleled by an important shift in the make-up of the Supreme Court. On September 8th, 1953, Chief Justice Fred M. Vinson died of a sudden heart attack at the age of 63. The death marked a new era in the Supreme Court, and indeed it seemed that some of the justices on the Court knew it: it is rumored that Justice Frankfurter responded to the news of Justice Vinson's death by saying "this event was the first solid piece of evidence proving the existence of God".¹⁷⁵ While a bit flamboyant, this urban myth seemed prescient now because it opened up the Chief Justice seat on the court, and Earl Warren, the man who replaced him, went on to oversee one of the most active and energized Courts

¹⁷³ Belknap 213

¹⁷⁴ Smith, Charles D., *Palestine and the Arab-Israeli Conflict: A History with Documents*, pgs. 239-244

¹⁷⁵ Spound, Albert M., *America for Sale*

in the nation's history.¹⁷⁶ Along with other Eisenhower appointees like Justice Brennan and Justice Harlan, Chief Justice Warren's appointment marked a shift in the Court's composition significantly towards the left in the realm of civil liberties. In turn, Chief Justice Warren would preside over some of the most seminal cases in the development of modern Constitutional Law, such as *Brown v. Board of Education*, *Miranda v. Arizona*, and *Griswald v. Connecticut*. Despite this historic legacy, Earl Warren, then the governor of California and one of the most powerful politicians in the country, hardly seemed like the natural choice.¹⁷⁷ Eisenhower was constrained by promises he made to Warren on the campaign trail that he would give him the next open Supreme Court seat, and after some deliberating, he finally made it official. In light of this reluctant arrival to the bench, Warren, who had never served as a justice on a court,¹⁷⁸ took a deferential approach to his first few years on the bench.

It was not long until the new Court had to decide a case on the censorship of domestic communism. Despite his decidedly bold step to form a unanimous majority in favor of the *Brown* decision in 1954, Warren joined the majority *Galvan v. Press*, which upheld the deportation of a Mexican immigrant who was a member of the CPUSA from 1954 to 1956.¹⁷⁹ In the decision, the Court maintained the limited approach towards constitutional protections against Communist Speech, deferring to Congressional evidence that "the communist Movement...is a worldwide revolutionary movement whose purpose it is....to establish a Communist

¹⁷⁶ Pollack, *Earl Warren: The Judge Who Changed America*

¹⁷⁷ Ibid, 80

¹⁷⁸ Sabin, 155

¹⁷⁹ Ibid, 122

totalitarian dictatorship.”¹⁸⁰ As the newly minted Chief Justice began to make sense of where he stood ideologically and pragmatically, however, he quickly identified with the more liberal wing of the Court long-represented by Justices Black and Douglas.¹⁸¹ This change could be recognized outside the Court, as Warren did a college lecture tour in the summer of 1954 where he repeatedly emphasized the importance of tolerating dissent, suggesting his openness to changes in the nation’s jurisprudence.¹⁸² As he stated in an interview for *Fortune* magazine, “in the present struggle between our world and Communism, the temptation to imitate totalitarian security methods is a subtle temptation that must be resisted every day”¹⁸³. As this statement made clear, Warren returned to the Court in 1955 with a clear focus on limiting what he saw as excessive restrictions on individual rights.

The first indication of Warren’s change, and its influence on the Court, was the expansion of 5th amendment protections to convicted Communists. In *Slochower v. Board of Education of New York City* in 1956, the Court ruled that a New York law punishing an individual for invoking their 5th amendment right against self-incrimination instead of answering questions was unconstitutional. As Justice Clark explained, “the privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt of a conclusive presumption of perjury” This relieved a major burden on the part of Communists facing trials under various anti-communist laws, as beforehand

¹⁸⁰ *Galvan v. Press*

¹⁸¹ Murphy, J. Thomas, *Justice for All: Earl Warren and the Nation He Made*

¹⁸² Pollack, 178-179

¹⁸³ “The Law and the Future”, *Fortune*, November 1955

pleading the 5th amendment was tantamount to a confession of membership in the highest ranks of the CPUSA.¹⁸⁴

The Warren Court continued to expand protections against anti-communist laws with the decision in *Cole v. Young* deemed the firing of a Food and Drug Inspectors for being CPUSA members unconstitutional. In the majority decision, Justice Clark writes that because there was no legitimate connection between the work of the FDA inspector and national security, there was no grounds for the firing. In doing so, this decision made a clear distinction: Communism, although a clear threat, was not so existential a concern that anybody who supported it had to be rooted out from the American government. While not a decisive rejection of the precedent established by *Douds*, it did place the decision with certain parameters. Chief Justice Warren's ability to effectively form coalitions between the liberal minded and moderate members of the court allowed him to be more assertive in developing the general thrust of the court and more effectively form majority voting blocs.¹⁸⁵ Subsequently, Warren quickly became the target of attacks from Senator McCarthy himself, who formed a political union with various Conservative Southern politicians hoping to remove Warren from the court following the Brown decision.¹⁸⁶ Despite these attacks, and the growing scorn of Eisenhower and other Republican politicians, the Court continued to strike down government anti-communist laws, going as far as to rule in *Pennsylvania v. Nelson* that state anti-sedition laws were unconstitutional because they were superseded by Federal laws.

¹⁸⁴ Sabin, 110

¹⁸⁵ Pollack, 160

¹⁸⁶ Saibn, 134

Although this did not alter the letter of the law, it did deny the FBI access to the wide network of local and state law enforcement agencies it had developed, a clear message from the Warren Court that anti-Communist measures were not going to receive a rubber stamp from his court like they did from the Vinson court.¹⁸⁷

Between this decision and their demand for a re-trial in *Mesarosh v. United States* on the grounds that FBI paid informers were suspected of lying, the Warren Court, as Senator McCarthy stated in a Senate Internal Security Meeting, “seems to be issuing one pro-Communist decision after another”.

The Warren Court and America’s Moral High Ground

Before moving on to the Warren Court’s challenges with the *Dennis* decision, it is important to understand the impact of Court’s decision in *Brown v. Board of Education*. Although highly controversial at home, it was immediately hailed abroad as a major victory for American equality: an hour after the decision was released, the Voice of America, an international radio station designed to spread American programming and propaganda abroad, was reciting the ruling in 34 languages around the world.¹⁸⁸ The Soviet Union had long criticized the U.S.’s ongoing racial inequality in an attempt to demonstrate the U.S.’s moral inferiority to Soviet Communism.¹⁸⁹ The *Brown* decision gave the United States evidence that they were beginning to move past these inequalities, thereby refuting a main claim of the nation’s critics. This desire to silence these critics was part of a larger notion of the

¹⁸⁷ Pollack, 186

¹⁸⁸ “Voice speaks in 34 languages to Flash Court Ruling” *New York Times*, May 18th, 1954

¹⁸⁹ Romano, Renee “Moving Beyond ‘The Movement that Changed the World’: Bringing the History of the Cold War into Civil Rights Museums”

moral image of the United States as an integral part of winning the Cold War. A dominant argument in the early 1950's, increasingly left wing publications like *The Nation*¹⁹⁰ and *New Republic*¹⁹¹ began criticizing American anti-communist measures along these lines. In their eyes, the flamboyant and overreaching actions of Senator McCarthy had damaged the legitimacy of America's anti-communist movement, and even staunch allies like Britain began to take issue with America's domestic subversion laws.¹⁹² In Western European countries, Communist parties, though generally small, were not as censored as their American counterparts due to larger bases of support, and the domestic governments were hesitant to support American policies that their constituents saw as draconian. With the *Brown* decision, the Warren Court seemed like the type of influential yet independent institution that could re-do America's anti-communist image. When the Court agreed to hear appeals on *Yates v. United States* in 1956, which concerned the arrests of 14 lower level CPUSA officials under the Smith Act, anti-Communist stalwarts like FBI director J. Edgar Hoover knew that the Court may well challenge the *Dennis* precedent.¹⁹³ On June 17th, 1957, "Red Monday", Hoover's fears were realized as the Supreme Court released a decision that permanently changed the nature of dissent in American jurisprudence.

¹⁹⁰ Comfort, Alex, "McCarthyism: The Impact on Europe", *Nation*, April 13th, 1953, 302-303

¹⁹¹ Hills, Jean R., "The British Press on 'Yanks' ", *New Republic*, August 23rd, 1954, pgs. 9-12

¹⁹² Ibid

¹⁹³ Sabin, 160

The Marketplace Expands

Yates v. United States

Amongst four Supreme Court rulings released on Red Monday overturning various anti-Communist verdicts, the *Yates* decision actually never deems the Smith Act unconstitutional. Instead, the opinion, written by Justice Harlan III, affirms the law's constitutionality, as originally written, in accordance with the nations right to self-preservation. They do, however, alter the parameters of the clear and present danger test as established by the *Dennis* decision, thereby altering who may or may not be prosecuted under the Act. The key to this change is the Court's emphasis on a clear distinction between advocacy and incitement, directly citing Justice Brandeis' decision in *Gitlow*. Whereas the Vinson Court determined that, in light of world events, supporting Communist principles of revolution constituted a clear and present danger, the Warren Court held that only when individuals directly organize actions to accomplish this revolutionary goal.

Split into three sections, the decision first deals with the "organization" aspect of the Smith Act. The Court ultimately determined that the CPUSA, which was founded in 1945, could not be prosecuted under this part of the law as it was passed in the form of an amendment 6 years later in 1951. Secondly, the Court sought to examine the type of instructions the Jury received, and ultimately ruled that, unlike in *Dennis*, they were not appropriately informed that the statute was directed towards incitement of action, not mere advocacy. As Justice Harlan explains, "it is not the abstract doctrine of overthrowing organized government by unlawful means

which is denounced by the statute, but the advocacy of action for the accomplishment of that purpose” Without this, the trials were biased from the start and had to be thrown out. It was the third section, however, that had the most bearings on Smith Act’s application to domestic Communism because it directly dealt with the type of evidence used in these cases.¹⁹⁴ As Justice Harlan explained, of the 14 convicted defendants, 5 of them would have no retrial, as there was no evidence beyond their Party membership to suggest that they partook in plans to incite action. Upon further analysis, the Court found that “instances of speech that could be considered to amount to ‘advocacy of action’ are so few and far between as to be almost completely overshadowed by the hundreds of instances in the record in which overthrow, if mentioned at all, occurs in the course of doctrinal disputation so remote from action as to be almost wholly lacking in probative value”. In doing this, the Court made it clear that membership in the Communist Party alone doesn’t establish one’s intent to incite revolution. This fundamentally undermined the entire framework of Smith Act anti-communist trials because instead of relying on the presentation of Communist philosophical texts that suggested a need for revolution, the FBI was now required to directly link the prosecuted individuals to some type of illegal action. By emphasizing the distinction between advocacy of action and incitement of action, the Court re-established the boundaries of the clear and present danger test delineated in the time before the Red Scare.

This emphasis on incitement rather than advocacy demonstrates the Court’s view that dissent, far from an active threat, is a vital part of the political process that

¹⁹⁴ Lichtman, 94

must be protected. As Justice Black explains in his concurring opinion, “unless there is complete freedom for expression of all ideas, where we like them or not, concerning the way government should be run and who shall run it, I doubt if any views, in the long run, can be secured against the censor.” This is a clear reference to the Marketplace of Ideas, but as suggested by the call for “complete freedom for expression of all ideas” this Marketplace is meant to be free of ideological boundaries. This change can be seen by the fact that the Warren Court, unlike the Vinson Court in *Dennis*, never really partakes in a comprehensive analysis of the implications of Communist ideology. It does not matter if they are a foreign aligned organization whose ultimate goal is the complete recreation of American government and society through whatever means necessary: all that matters is whether or not they are actively working to promote illegal activity. This new Marketplace is meant to be one where no matter how repugnant, unpopular, or even openly hostile, a political ideology is, only active preparation for illegal action permits proponents of that ideology to be censored. This is further demonstrated by the fact that Justice Black’s concern over the Marketplace of Ideas is based on a fear that such restrictions would make no ideology safe from censorship rather than establishing a precedent that would hamper the development of better policies. In doing so, this language embraces the Marketplace of Ideas in a more expansive way than previously envisioned by going beyond justifying the utility of Free Speech alone. Instead, it presents Free Speech as a principle inherent in free government that all citizens are entitled to practice. In other words, it merges the utility-driven nature of the original Marketplace envisioned by Justice Holmes in *Schenck* with a

more participatory perspective on speech as advocated for by the Democratic Self-Governance school of thought.

In doing so, Justice Black demonstrates decidedly the full impact of this decision. The distinction between advocacy and incitement in the clear and present danger test, more than anything, is designed to allow individuals as much room as possible in presenting ideas that are seen by many to be completely contrary to what American government is and should be. This expanded breathing room allows the individual to actively become a part of the Democratic process, thereby establishing a new level of importance of the participation and tolerance of political dissidents. The political ideologies of any citizen, even if they are sympathetic to foreign powers or abstractly support active, violent revolution, are permitted into the Marketplace of Ideas. In this light, the *Yates* decision, though based on a return to the distinction between advocacy and incitement established by Justice Brandeis, redefines the identity of a legitimate citizen in the Democratic process. After a decade of Cold War repression, the Court determined that offensive ideas, even ones connected existential and geopolitical threat of Communism, did not remove an individual from the larger Democratic process. The idea of an “un-American” political ideology, which had fueled the debate on political censorship since the beginning of the nation, was rendered legally impossible.

Impact of *Yates*

A Stalinist Party in a Post-Stalinists World

Despite the jurisprudential change following *Yates*, there was no new era of prosperity and political re-awakening for the CPUSA and American Communism.

Instead, the party slowly drifted further and further into obscurity. Although, as Eugene Dennis put it, the Party was working to “surmount losses sustained during the cold-war decade [and] to overcome our relative isolation”¹⁹⁵, the damage was already done. Despite the fact that the Communist Party was now free of the Smith Act trials that had plagued its members since the *Dennis* decision, it was still viewed with general condemnation by the end of the decade.¹⁹⁶ The détente may have cooled off relations between the Soviet Union and the U.S., but that did not mean they were reset to World War II levels of cooperation. In this frigid atmosphere, the CPUSA found that the American public still had little appetite for Communist domestic policies. The Court had given them access to the Marketplace of Ideas, but that didn’t mean the Marketplace would embrace them.

Furthermore, the Party’s membership was decimated by the internal ideological and loyalty-based purges of the Red Scare years. From a high of over 100,000 at the end of World War II, the party barely number 10,000 by 1958, more than 1,500 of whom were FBI informants.¹⁹⁷ This decrease was not only due to the removal of high-ranking officials, but also the general emphasis on conformity to the party doctrine led many members to condemn the CPUSA as stagnant and ineffective.¹⁹⁸ As the editor-in-chief of the *Daily Worker* said when explaining his resignation from the party, “I have come to the reluctant conclusion that the party cannot be changed from within and that the fight to do so is hopeless”¹⁹⁹ In light of

¹⁹⁵ Excerpt from speech given at the Party’s 1957 national convention

¹⁹⁶ Starobin, 225

¹⁹⁷ Fried, 303-310

¹⁹⁸ Kurt, 442

¹⁹⁹ Gates, John, *The Story of An American Communist*

the Khrushchev's revelations on Stalin's inhumane tactics, high ranking members of the party's inner circle increasingly began to remove themselves from the party. This demonstrates the way the geopolitical connection to the Soviet Union that had defined the CPUSA since its creation, and fueled much of the anti-Communist efforts of the era, ultimately undid the Party. By making themselves a branch of the U.S.S.R., and stern supporters of Stalinism, they attached themselves to a platform they ultimately in fact did not support. The CPUSA realized this and attempted to emphasize creating a new, more independent party that would be able to adapt its message to the needs of the American working class.²⁰⁰ The problem was that, as membership continued to dwindle as the decade went on, hard liners in the Party like Secretary Foster insisted on maintaining connections to the Communist International, and their prolonged debates eventually succeeded in convincing reformers the futility of their efforts.²⁰¹ Denied the ability to create a new, U.S.-oriented Communist Party, the post-Stalin CPUSA quickly became a marginalized group of pro-Stalinist ideologues. By embracing the platform of foreign powers, the CPUSA guaranteed it would never be able to develop a lasting American identity and the political footmark such a change may have offered.

The Birth of a New American Citizen

Despite the failure of the CPUSA to fully integrate itself into the American political system following Red Monday, the *Yates* decision marked the beginning of a redefinition in what it meant to be a citizen in the United States. In defending the

²⁰⁰ Starobin, 225

²⁰¹ Ibid, 277

CPUSA's right to protected speech, an organization explicitly connected to America's greatest political rival that theoretically supported a domestic revolution, the Court expanded the openness of the Marketplace of Ideas beyond where even Justice Brandeis and Holmes envisioned. Whereas *Abrams* and *Gitlow* and similar cases supporting the Marketplace of Ideas in the 1920's and 30's were based on protecting the rights of Communists in times of peace, *Yates* affirmed that even in the Cold War environment of paranoia and constant threats, political speech had to be protected. In this way, citizenship was no longer connected to loyalty to, or even support for, the United States and what it stands for. It was now based on the notion that a Democratic government cannot be truly democratic unless its citizens are able to express whatever ideology best represents them.

The fact that this decision was made in an environment greatly concerned with security threats is in fact a large part of *Yates'* impact. As explained earlier, American political history has been marked by moments of pathological repression of unpopular ideas.²⁰² These tactics are even more pronounced in times of war, as can be seen by the Lincoln Administration's denial of habeas corpus to accuse Confederate supporters, the World War I era Espionage and Sedition Acts, and the Court's decision to support Japanese Internment Camps in *Korematsu v. United States*. Although the Cold War was not an active war by definition, the language of repression towards Domestic Communism was largely couched in terms of national security based on the CPUSA's connection to the Soviet Union. They were seen as enemy combatants and enemy sympathizers, and America followed this pattern of

²⁰² see note 137

domestic suppression based on these fears. Although the easing of tensions leading up to the *Yates* decision made war seem less imminent, the Cold War environment of constant tension still made conflict a possibility. The fact that the Court accepted the existence of such an environment and still upheld the speech rights of domestic Communists based demonstrates a break in the cycle of reflexive repression of enemy sympathizers and supporters in times of ideological and military conflict. In doing so, the Court created the jurisprudential precedent that even those individuals who, abstractly, advocate the removal of the existing U.S. government by revolutionary and military means are citizens who have unhampered access to the Marketplace of Ideas.

As with all things, this change wasn't immediate. In the years following the *Yates* decision, the Court seemed at times to be returning to its Red Scare policy of blurring the lines between advocacy and incitement. A prime example of this is the decision in *Scales v. United States* in 1960 to uphold the conviction of Junius Scales under the Smith Act for membership in the CPUSA. A year later, the Court upheld the constitutionality of the Smith Act's prohibition on membership in organizations recognized as subversive in *Communist Party of the United States v. Subversive Activities Control Board*. This backtracking rested on the Warren Court's difficulty in establishing a clear line between advocacy of abstract action, which more liberal justices wanted to protect, and direct action, which had generally been accepted as constitutionally punishable. Ultimately, this debate culminated in transformational changes in Free Speech doctrine: the replacement of the clear and present danger test with the imminent lawless action test.

The imminent lawless action test requires censorship of speech to be based on whether the speech in question is designed to incite or produce imminent lawless action and whether or not it is likely to produce such action. This standard, established in *Brandenburg v. Ohio*, decidedly favors a more accessible approach to Free Speech by requiring the prosecution to find direct links between censored speech and illegal action. Arguments for censorship based on the possible societal effects of that speech, the backbone of the *Dennis* decision, were decidedly rejected. In doing so, this new standard laid the foundation for a modern doctrine that, as detractors have often noted, has protected ideological minorities like racial hate groups.²⁰³ This insistence on focusing on planning of action is a clear extension of the *Yates* decision's emphasis on direct incitement. The Court directly brought up this relationship by noting the importance of the *Yates* decision in rejecting advocacy as a reasonable cause for political censorship in the decision's footnotes.²⁰⁴ By re-emphasizing the importance of concrete connections between individual's speech and individual's illegal actions, *Yates* thereby laid the groundwork for the imminent lawless action test.

Inherent in this new test is the Court's emphasis on content neutrality in determining the constitutionality of speech censorship. This approach, which permits the need to restrict certain forms of speech based on a variety of situational and societal needs, states that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its

²⁰³ Most notably demonstrated in *National Socialist Party of America v. Village of Skokie*, 1972, wherein the Court protected the right of Neo-Nazi Organizations to march in a community with a high population of Holocaust survivors

²⁰⁴ See footnote 2, *Brandenburg v. Ohio*

subject matter or its content.”²⁰⁵ In effect, it has required the court to rigorously determine whether or not censorship of politicized forms of speech are based on a desire to diminish the saliency of that idea or a more reasonable time, place, or manner restriction, such as prohibitions on fighting words, obscenity, and the maintenance of effective school environments.²⁰⁶ In doing so, this concept gives doctrinal protection for the pursuit of a more expansive, participatory Marketplace of Ideas as advocated in the *Yates* decision. This can be demonstrated by the decision in *Police Department of the City of Chicago v. Mosley*, in which the court overruled a law preventing an individual from picketing outside a school that is not a labor-based protest. As Justice Marshall explained, “to permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship.” Not only does this quote clearly harken to the Marketplace of Ideas’ emphasis on progress through discourse, but it also emphasizes the importance of individual self-development through collective action.

This demonstrates a fusion of the Democratic Self-Governance model of speech with the Marketplace of Ideas in a manner designed to present individual self-development and national progress as a united goal. By creating a system that allowed all individuals, regardless of ideological views, the court’s emphasis on content neutrality created a jurisprudence wherein “all speech claimants must be granted a hearing, regardless of the nature of their views, because each has equal

²⁰⁵ *Police Dep.t’ v. Mosley*, 1972

²⁰⁶ Choper, 404-423

status in the eyes of the law.”²⁰⁷ This provides a new idea of what a citizen is. Not a follower of specific ideals or an adherent to shared guiding principles, but an individual who ventures into the tumultuous Marketplace of Ideas and tries to inject whichever ideologies they deem worthy. In doing so, the Court has developed a framework that has expanded the very notion of who has access to speech, and who can be silenced.

²⁰⁷ Downs, Donald, *Nazis in Skokie: Freedom, Community, and the First Amendment*, pg. 3

Conclusion

Effect of Censorship on Democratic Identities

As demonstrated by the increasingly punitive nature of anti-communist measures as the Red Scare went on, the American public and representatives alike continually disassociated domestic Communists from the rest of the American population as a whole. To them, these individuals were not citizens: they were foreign agents. This development, however, needs to be qualified, as the connection between the CPUSA and the Soviet Union was a unique relationship that is not replicated in every instance of state-sanctioned repression. Therefore, it is difficult to conclude decisively whether or not censorship of certain ideologies directly leads to the development of stratified perceptions of Democratic access on the part of the censors. Instead, it would be more reasonable to conclude that individual groups that are in one way or another connected to foreign agents, particularly those who are hostile to the United States, are more likely to be categorized as outside the bounds of Democratic legitimacy due to their dual loyalties. The implications of this are clear: if you want to justify censorship, the best way to do so is by connecting the desired group to a foreign entity. Alternatively, to avoid censorship, it may be effective to actively work towards establishing a clear domestic identity that emphasizes the organizations connection to the national community as a whole.

The problem, as demonstrated by the gradual collapse of the CPUSA, is that in many ways such organizations may have a tendency to renounce their domestic connections and further align themselves with foreign powers. In this way, the repressive tactics of the United States government did have a destabilizing impact

on the democratic identity of the members of the CPUSA as it pushed them further and further away from the political system, most notably in the form of their connections to the CIO and various state-level apparatuses. Although this occasionally led them to try to directly insert themselves into government, as demonstrated by the Progressive Party of 1948, or assert their place as rightful citizens, as in their challenges to the *Dennis* decision, by and large these tactics succeeded in isolating them outside of the realm of American politics.

This de-democratizing nature can also be seen in the purges the CPUSA undertook periodically in order to remove any possible opposition to their platforms from within the party. Catalyzed by fears of a gradual weakening of the party's ideological core, these purges were precipitated on emphasizing authority over dissent: if you criticized the party, you were attacking the party, and if you were attacking the party, you had to be removed. This is an unexpected finding as it suggests that the CPUSA's lack of a strong connection to the American political system as a result of Red Scare censorship may have ultimately led them to denounce Democratic approaches towards organization as a whole. While part of this can be explained by Soviet Communism's emphasis on leadership, the fact that these purges increased dramatically as the party was coming under governmental attack indicates that there is an explicit connection between this shrinking tolerance for internal dissent and government sanctioned censorship.

Impact of *Yates* on Modern Jurisprudence

As has been demonstrated, the *Yates* decision laid the groundwork for the modern First Amendment protections provided to political speech. By establishing that individuals of all ideologies are entitled to voice their opinions, even if they were abstractly illegal, the Court merged the utility driven Marketplace of Ideas with the individualized Democratic Self-Governance School. In doing so, the Court established a precedent wherein the notion of who constitutes a legitimate citizen has been expanded to preclude any ideological requirements. No matter how potentially egregious or foreign certain ideas may seem or how much possible societal damage may be established due to the ideological effects, citizens of the United States are citizens of the United States. The Court saw what happened when abstract possibilities are given weight in determining the impact of unpopular speech, and they decided to ultimately renounce such justifications in favor of the more stringent imminent lawless action test.

This realization is essential because it rationalizes the Court's staunch commitment to content neutrality in determining the constitutional legitimacy of state-sanctioned censorship. By looking to *Yates* and other anti-communists decisions as the basis of modern content-neutral approaches rather than the decisions of the late 1960's and 70's, such as *Brandenburg v. Ohio* and *National Socialist Party of America v. Village of Skokie*, it is clear that the legacy of the Red Scare's broad-based assault on Communist ideologies has rendered the Court hesitant to permit any form of political censorship. To do so would invite the type of democratic stratification that became law in this era.

The importance of this development cannot be understated. Although sometimes it may disgust us, forcing us to hear content and ideas that make our skin crawl and seem to poison the air around us with ignorance and evil, this framework has laid the building blocks for a society based on active engagement with ideas and acceptance of alternate opinions, at least as a reasonable perspective. It is in this capacity to create a society more open to intriguing and at times frightening opinions that many scholars have pointed to as the true effect of modern Free Speech Jurisprudence.²⁰⁸ From this perspective, the virtue of expanding speech protection to all individuals, regardless of ideology, and welcoming them to the Marketplace of Ideas as equal citizens under the law instills in individuals a sense that there is no uniform doctrinaire approach towards life, but instead that different groups and different people will see the world differently. Sometimes that difference will amaze us, and some times that difference will frighten us, call into question our very notions of morality and who we are as a society. It may be tempting to succumb to this repulsion and use it to justify a categorical rejection of what the opposition is saying, but as John Stuart Mills said nearly 200 years ago, “the price paid for this sort of intellectual pacification is the sacrifice of the entire moral courage of the human mind.”²⁰⁹ The Court, by protecting the speech rights, and citizenship, of all ideologies, has worked to create a society based on such moral courage. Ideas, and the people who hold them, aren’t to be categorically discarded, but welcomed to the ongoing debate and given an opportunity to make their aspirations a reality. We are

²⁰⁸ See Bollinger, Lee, *The Tolerant Society*, and Richards, David, *Toleration and the Constitution*.

²⁰⁹ Mills, *On Liberty*, 31

free to challenge them, but it is their inalienable right to challenge us too. Only by doing so, rather than silencing them out of hand, can we grow as knowers of the world around us. Furthermore, in creating such a system, the Supreme Court has recognized the inalienable freedom of each individual to express themselves for all the world to see. The American Marketplace of Ideas, while not perfect, is more open than ever before, and it is in large due to the clashes over the civil liberties of American Communists in the 1950's.

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